United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

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United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—v.—

J. W. MAYS, INC.,

Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR J. W. MAYS, INC., RESPONDENT, IN OPPOSITION TO THE APPLICATION BY THE NATIONAL LABOR RELATIONS BOARD FOR ENFORCEMENT OF ITS ORDER

Issues

While these proceedings do encompass the issues set out in the brief of the National Labor Relations Board ("Board"), there are also present the issues 1) as to whether the law, even on the facts found, supports the conclusion that some of the alleged violations of the Act actually amount to violations, and 2) whether a broad order is justified in any event.

Statement of the Case

This portion is predicated on the findings below, and on the uncontroverted evidence. It is an overall statement, designed to set up the background against which the issues

should be viewed. We propose thereafter to set out both the facts of each specific violation found, and our argument in opposition to each such finding.

Respondent, J. W. Mays, Inc. ("Mays") owns and operates a chain of department stores in the New York area, including one in Massapequa, Long Island (A5, A259).* That is the only store involved.

Mays has almost 6000 employees, with the average employee number at Massapequa being about 650. Since some 1500 W-2 forms were prepared the previous year for Massapequa, the turnover was referred to as about 250 percent (the transcript, and now, the Appendix, says "persons"), a turnover rate applicable to all stores, not just Massapequa (A259-A260). In June of 1973, 73 employees left Mays' Massapequa for various reasons; in July, 52; in August, 121. Mays is open 6 days a week, with Massapequa alone having customer traffic of some 8000 persons a day (A260). Mays' Massapequa has some 72 different departments (A29).

On March 22, 1973, Local 30 of the Operating Engineers filed a petition (29-RC-2202) (G.C. 2a) (A438), for a unit of powerhouse and skilled maintenance employees at Massapequa. Only the 7 so-called maintenance helpers were in that group, to wit, Klepack, Coletto, Gambino, Cannon, Izzo, Brandt, and Roudabush (see, also, A90, A399). De Ronde was their supervisor (A103, A121, A138, A399). Cannon, found by the Administrative Law Judge ("ALJ") and, since the finding was not disturbed, also by the Board, to be "an instigator of the union movement" (A14, fn. 16)

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* "A", followed by a number, represents the page reference in the Appendix. "T", followed by a number, refers to the corresponding page in the typewritten transcript of the record. "G.C.", followed by a number, refers to the corresponding exhibit proffered by General Counsel during the hearing. "R", followed by a number, refers to the corresponding exhibit proffered by Mays during the hearing.

The Court should be apprised of the lamentably excessive number of typographical errors in the typewritten transcript. References in this brief involving significant "typos" will expressly clarify them and, accordingly, it is hoped and expected that the Court will thus not be inconvenienced.

testified, without contradiction, that he was the "instigator". He was a member of Local 30 both when hired and at least right through the date of his testimony (A128). He was the one who contacted the Union's agent, Lunger, told him Mays was ripe for organization, got cards from him, distributed six of them to the maintenance help, and returned those six to Lunger, all signed, inclusive of his own (A121-A123, A128).

On May 2, 1973, the second of the two hearing days on that petition, not only Brandt, but also, Gambino and Cannon testified for the Union (A440; par. 9b of the complaint refers only to Brandt, A66). In that R case, Mays took the position, inter alia, that the petition called for a fragmented unit and, as reflected by G.C. 2b, the decision on the petition (issued May 29, 1973), this position was upheld. In support thereof, Mays submitted evidence that the jobs of the referred to 7 were quite similar to the jobs of at least 20 others, and Mays produced a list of these 27, with their classifications. That list, admitted into evidence during the R-case hearing, has been admitted here as G.C. 2e, and is reproduced at A90.

Local 30 thereafter joined with Local 307 of the Service Employees in filing, on June 19, a joint petition (29-RC-2287) (G.C. 2c) (A439) for an election in a bargaining unit consisting of various classifications presumably intended to encompass the 27 on the referred to G.C. 2e. Hearings were held on three days, July 11, July 17, and July 23, 1973. Murphy testified for the union on July 17 (he'd already been discharged) and Gribbins so testified on July 23 (A440). That petition, too, was dismissed, on August 30, 1973 (A439) (G.C. 2d).

On June 19, 1973, apparently simultaneously with his filing of the new, referred to, joint petition, Counsel to Local 30 filed a charge (29-CA-3441) alleging the discriminatory termination, on or about June 8 of Fazio and Dashefsky, and on or about June 13 of Brandt (A59). On June 28, 1973, the same counsel, albeit now indicating he represented both Locals 30 and 307, filed a charge (29-CA-

3458), alleging the discriminatory transfer of Laura Gribbins on or about June 19, and the discriminatory termination of Murphy, on or about June 18 (A60). On August 23, 1973, Laura Gribbins herself filed a charge (29-CA-3519) alleging her discriminatory termination, "on or about" August 21, 1973, and that of one Evelyn Upton, on or about June 16, 1973 (A62). The charge with respect to Upton was dismissed, and her appeal was denied.

A complaint subsequently issued (G.C. 1i, A63-A71), consolidating all the charges, save for Upton, and containing a series of alleged, albeit never charged, 8(a)(1)s* together with two alleged, albeit also never charged, 8(a)(4)s, vis-a-vis Brandt and Gribbins. The answer (G.C. 1k; see A1) denied the commission of any unfair labor practices, a position we firmly reassert here. The search for particulars (G.C. 1l) (A72-A79) to prepare for trial bore the usual result (G.C. 1p) (A81-A89) including the usual refusal, because "evidentiary," of the names of those to whom the threats, warnings, directions, interrogations, etc., were addressed, and of the manner in which those acts were effectuated. Apparently, it was deemed sufficient to say "employees"—using the plural [even though we now know that, in some instances, only 1 employee was involved (General Counsel knew it too)].

The ALJ found the 8(a)(1)s now involved, plus a surveillance 8(a)(1) with respect to Gribbins. He found an 8(a)(3) and 8(a)(4) discharge of Brandt, an 8(a)(3) transfer, and then, an 8(a)(3) and 8(a)(4) discharge, of Gribbins. The Board dismissed the surveillance 8(a)(1) of Gribbins, the transfer 8(a)(3) of Gribbins, and the 8(a)(3) and 8(a)(4) discharge of Gribbins. The termination of Fazio, Murphy, and Dashefsky was found proper. It will be noted that Gribbins and Dashefsky do not even appear on G.C. 2e. What this boils down to, for present purposes, is that, of 27 named, assumed, union "targets," only 1, Brandt, was found below (erroneously, as we expect to demonstrate) to

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* References, with or without the word "Section", refer to corresponding parts of Section 158 of Title 29, U.S.C.—see Addendum.

have been discriminatorily discharged. And, this one dismissal, we again note, took place in the context of Mays' characteristically enormous turnover. Of the some 246 employees whose employment with Mays' Massapequa terminated in June, July and August of 1973, the period in which the original 5 alleged 8(a)(3) dismissals took place, 241 were, presumably, not in the union, while the great bulk of the union adherents were retained (it will be seen that Brandt claims he himself received some 19 signed cards from the union "targets," in addition to the 6 already obtained from the 7 maintenance helpers). Moreover, with one exception to be noted subsequently, the 8(a)(1)s found took place only after the union lost the first petition—that is to say, Mays then allegedly warned, directed, etc., for the purpose of dissuading the few employees involved from supporting the union, coincidentally precisely in time for the uncharged 8(a)(1)s to support the charged 8(a)(3)s.

Threats were alleged to have occurred as early as February, 1973 (complaint, par. 12, A67; see, also, reply to motion for bill of particulars, par. 2b, A82-A83). Of course, no such finding was made and, indeed, there was no such testimony. It was simply one of the allegations thrown into the pot.

Notwithstanding the substantial modifications made by the Board with respect to the ALJ's findings, his recommended broad order was, except for technical changes, retained (fn. 3, A55).

The U.S. Court of Appeals for the Fourth Circuit said, in *N.L.R.B.* v. *Wix Corporation,* 4 Cir., 309 F.2d 826, 839:

> "These few incidents in a plant employing approximately a thousand employees are a slender support for the Examiner's conclusion, and the Board's, that the employer had an intense antiunion animus and was willing to take extreme and unlawful measures to root out the supposed evil, a conclusion which highly colored the approach to the fact-finding process. The conclusion is all the more dubious because of what the Board com-

pletely ignored, a speech by the president of Wix to all of the employees, made at a later date, in which he quite fairly informed them of their rights, the fact that a number of other employees not claimed to be union members were released about the time of the challenged discharge and the fact that a number of union adherents, still employed at Wix, have been subjected to no discrimination."

In *N.L.R.B.* v. *United Parcel Service, Inc.*, 1 Cir., 317 F.2d 912, 914, the First Circuit rejected, as evidence of antiunion animus, various findings relied upon by the Board, which it described as:

"little more than a multiplication of minutiae whose cumulative impact can in no sense be regarded as substantial evidence on the record considered as a whole. National Labor Relations Board v. Walton Mfg. Co., 369 U.S. 404, 82 S. Ct. 853, 7 L. Ed. 2d 829 (1962)."

This Court, in *Bon-R Reproductions, Inc.* v. *N.L.R.B.*, 2 Cir., 309 F.2d 898, at pp. 903-904, said this:

"* * * the Board has ruled that 'isolated and vagrant' statements or conduct does not even constitute a violation. Playwood Plastics Co., Inc., 110 NLRB 306, 313 (1954); West Texas Utilities Co., Inc., 85 NLRB 1396, 1400 (1949), enforced 87 U.S. App. D.C. 179, 184 F. 2d 233 (1950), cert. denied, 341 U.S. 939, 71 S. Ct. 999, 95 L. Ed. 1366 (1951). A substantial inroad will be made on the right to express one's views, National Labor Relations Act, Sec. 8(c), 61 Stat. 142 (1947), 29 U.S.C. Sec. 158(c), if under pain of Board proceedings and contempt of orders issuing therefrom, an employer (or employee) must control his every word or refrain from speaking altogether."

These citations, to which, along with others, we shall have occasion to repeatedly refer, describe this case pre-

cisely, although they do not, in any way, imply that any 8(a)(1) threats, warnings, etc., took place. Moreover, even as erroneously found, the latter would not, nor could such minutiae, support the ALJ's finding of an "intense anti-union animus" on the part of Mays (to wit, it engaged in a "counter campaign to harass and rid itself of the small group of maintenance men", A13, at fn. 14; "general attitude of opposition to the purposes of the Act", A43). Here, as in *Wix*, the "conclusion * * * highly colored the approach to the fact-finding process."

One further point.

If we examine the reply to our motion for a bill of particulars (A82-A86), we note that what appears to be the large number of 8(a)(1)s alleged in the complaint are, in fact, repetitious, the same old hash reheated and called another dish. Thus, as one example, Katz, on June 7, in the afternoon, allegedly warned and directed (par. 1c, A82), threatened (par. 2a, A82), and created the impression of surveillance, all in the same place (par. 5a, A84). Obviously, the June 7 allegations have to do with the occasion when Brandt received a written warning from Katz, to be discussed shortly. This one incident, involving the exchange over Brandt's then denied, but now found, solicitations on working time, was thus broken down into all sorts of claimed 8(a)(1)s (none of which were actually found, however).

The Brandt 8(a)(1)—Alleged Threat of Recrimination and Loss of Possible Benefits Because of Union Activities (A8).

This 8(a)(1) is based on Brandt's "testimony" that De Ronde told the group of maintenance helpers that, because Katz (a Mays' vice-president and the general store manager) had a hate for them, they would be gotten rid of; also, their chances for promotion, particularly Brandt's, were halted by the union campaign (A8). The ALJ said De Ronde denied having union conversations with Brandt (A8). The issue thus being credibility, according to the ALJ, he chose to disbelieve De Ronde. Why? Brandt, while his testimony was not clear, seemed to attempt to recall

with "honesty and candor". De Ronde appeared to want to please his employer. So, he finds the above 8(a)(1).

The testimony is misread and misinterpreted, as to Brandt's testimony, as to the stated grounds for the credibility resolution and, above all, as to the alleged issue requiring a credibility resolution. There is no such issue at all.

The finding that "Brandt was a leader in Local 30's campaign to organize the employees in the maintenance department ("maintenance helpers") (A7) is not supported by an iota of evidence. Not only, as we have pointed out, was Cannon the leader and organizer, but also, Brandt himself so verified, implicitly, but nonetheless effectively (A139-A140). He also testified Mays knew Cannon to be a union "plant". We delineate this at the outset, for nothing seems to have happened to Cannon (or Gambino, either, both of whom previously testified along with Brandt). Cannon was never warned, threatened, etc. He simply left, sometime in October, after the events in question (A304, A401), nor is there any charge concerning him, nor any testimony on his part to the effect that he was discriminatorily treated in any way, notwithstanding Lunger (erroneously termed "Longo"), Local 30's business representative (A134-A135), testified, inter alia, Cannon habitually left his work to come out to the parking lot to attend the union-sponsored meetings (A137). Brandt was, it turned out, a leader in the drive, after the dismissal of the first petition dealing with the maintenance helpers, to organize the others listed on G.C. 2e (A142), to which fact we shall shortly address ourselves. The confusion below is apparent, but the salient fact is that the leader of the drive to organize the maintenance helpers, presumably known to Mays, never had anything adverse happen to him.*

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* We were asking De Ronde, the supervisor, what happened to his man, Cannon, this leader in the campaign to organize his men. De Ronde says he just disappeared, some months after the events in question. The ALJ then tells us to "proceed with something involved in this case" (A401), as if the treatment of the "known" instigator is irrelevant, an accurate reflection, we suggest, of the fact finding proclivities of the ALJ.

The ALJ went to some lengths to "prove" De Ronde's knowledge of the union campaign (A7, fn. 5), as if overruling a contrary contention. Now, Cannon testified to several discussions with De Ronde about the Union with a lot of the maintenance helpers present (A124, A127; see, also, A132, A133, A134). Brandt, of course, also testified to such discussions (A144-A146). The point is, De Ronde himself confirmed them (A402, A413-A414). Moreover, he testified, uncontradictedly, he told the men they could not get fired for signing union cards (A402, A414), and that he was specifically asked by Cannon to relay his message as to the decision on the first petition (so found, A7, fn. 5, but apparently in the context of "proving" De Ronde's knowledge of the "union campaign"). De Ronde also uncontestedly testified he was asked to relay the message specifically to Mike (Brandt) that the decision was the Union won, that he did so (A406), that the men brought up the union question, not he (A402), and that they frequently spoke about the Union in his presence, and often with him (A413). Brandt testified that, on his dismissal, De Ronde told him to send a request for a recommendation to him personally and that he, De Ronde, would give that recommendation (A157).

What we have, then, is the testimony, not only of De Ronde, but also of the Union witnesses themselves, that he was a friendly supervisor, before and with whom the men had not the slightest hesitation in talking and discussing "union". So much, then, for the ALJ's statement, conjured, apparently, out of thin air to support his baseless credibility resolution, that "De Ronde denied having any conversations with Brandt concerning the Union" (A8).

The ALJ's finding of De Ronde's denial was preceded by his finding of the Katz "hate", "get rid of them", and "halting of promotional opportunities for all of them" story (we know of only one opportunity—the possibility of being promoted to De Ronde's assistant, fn. 6, A8). Let us turn to that.

As part of fn. 5 at A7, it is found Cannon "credibly" (typically unexplained ALJ "shorthand") testified De

Ronde, in March, spoke against the Union and said it would not be to the benefit of the maintenance helpers to join. Presumably this is intended to set up De Ronde's animosity, although this is not an 8(a)(1), not charged, not complained of (cf. par. 11 of the complaint, A67), and not found to be an unfair labor practice (see A41, par. 2; A128). What the ALJ did not note is that Cannon testified De Ronde explained his statement, A124,—to wit, De Ronde had had bad experience with unions in that he was a member of an electrical workers union and had been passed over for a promotion (we gather this means his merit gave way to someone's higher seniority). This hardly demonstrates animosity, but we seek not to dwell on this point [see A127, where the ALJ himself stated he was "at a loss to know why this witness (Cannon) was called" (matter in parenthesese supplied)]. More to the points we are about to develop is that Brandt, Izzo, Gambino, Coletto and Roudabush were also present at this discussion (A124). Brandt and Coletto were on the stand and said not one word about this incident. Izzo and Gambino, union devotees, were not called by the General Counsel, while Roudabush was actually subpoenaed by the General Counsel but not called (A347). Out of all this, the ALJ finds Cannon "credibly" testified as to De Ronde's alleged comment. The significance of this recital lies not in the "devastating" nature of De Ronde's alleged statement, but in the fact that this procedure was repeatedly followed by the ALJ (as we shall have continued occasion to repeat) in resolving credibility issues, dealing with "corroboration", predicating inferences, and reciting "facts."

This leads us to the 8(a)(1) itself. The General Counsel had asked Brandt if he had a conversation with De Ronde after the May 29, 1973 decision. We direct attention to the testimony at A144-A147, where even the ALJ had to keep telling Brandt, time after time, to tell him what De Ronde actually said. At A144, Brandt testified:

> "* * * we discussed the decision and the fact that regardless of whether the union won or lost we were going to get fired."

The General Counsel asked, who said that, and the answer was (A144-A145):

> "Mr. De Ronde, because I think it was said that Mr. Katz had a hate for all of us and that he was going to get rid of us one way or the other as it went."

We note that De Ronde's name seems to have just slipped in, for then followed questions by General Counsel and the ALJ trying to ascertain just what De Ronde said. The quoted words plainly show Brandt did not testify that Katz had a "hate". He did not even testify it was De Ronde who reported that "hate". He tied De Ronde into the firing-of-all-of-them statement, "because it was said" Katz had a hate, a complete non sequitur. Brandt was repeatedly asked, what did De Ronde say, what did you say. The testimony recorded at A144-A145 is most enlightening as to Brandt's evasiveness, and his dodging even the ALJ's questions. (The record does not reveal his squirming on the chair). The ALJ had to tell Brandt he was giving the same general answer three or four times. Then, on another tack, and after being expressly reminded by General Counsel (after additional questioning brought forth nothing) about the post of assistant engineer, Brandt said, "Oh", and then came the story about chances for advancement being halted, particularly his (A146). Brandt fixed the date of this conversation as just after the first decision, that is, a day or so thereafter, making it May 30 or May 31. He said that Coletto was present, Roudabush was present, and that he thought Izzo was there too. The ALJ—once again—had nothing to say about Roudabush's having been subpoenaed but not called, Izzo's not being called, and Coletto's actually being on the stand, but saying not one word about Katz's "hate".

Brandt summed up another general conversation by saying that De Ronde said, " * * * if the union did get in we would be let go anyway because then the store would require better skilled employees" (A147). Brandt then testified to Mays' knowing Cannon was the "plant for the Union", and added that De Ronde said,

> " * * * regardless of what happened that Cannon would wind up coming out ahead anyway because if he got fired from the place he would just go back to a union job" (A147).

The date of this conversation seems to have been fixed at about the time of the "all-were-to-be-fired" conversation, shortly after May 29, 1973 (although Cannon, he says, was brought up several times before).

It was in regard to this latter conversation the ALJ found De Ronde denied ever discussing the union with Brandt, decided the issue was whether to believe Brandt or De Ronde, and then selected Brandt, on the grounds previously set out.

To begin with, there is something unreal about a conversation a day or so after the union's petition was dismissed, wherein De Ronde is predicting what will happen "if" the union gets in. The union had just "lost". Who could know or even guess, at that time, the Operating Engineers would pursue the matter by joining with the Service Employees to encompass employees as removed from Local 30's occupational jurisdiction as moon men? And, yet, De Ronde is apparently supposed to have known that and, presumably, therefore, made the alleged statement. However, prior to the decision, Brandt has De Ronde in effect describing the advantages of unionism, telling the union adherents that Cannon's being a union man guaranteed him against damage "if" Cannon, the known union instigator, got fired. Brandt's testimony doesn't make any sense at all, particularly since, immediately after the decision (A147), De Ronde also allegedly told Brandt no one

would be promoted to be his assistant, particularly not Brandt (A146). With everybody presumably going to be fired, it seems quite anomalous to refer to a diminished opportunity for advancement for all of them, and to a particularly diminished opportunity for Brandt's advancement. Perhaps this is an example of what the ALJ meant when he referred to Brandt's testimony as "not always the epitome of clarity" (A8).

Because the 8(a)(1)s of Cannon and Coletto are generally related to the Brandt 8(a)(1), in the interests of continuity, we skip to the facts as to them.

The Coletto 8(a)(1)—Alleged Advice That He Could Be in Trouble for Signing a Card, Implying Coletto's Termination (ALJ's Heading, "Additional Alleged Violations of Section 8 (a)(1)", No. 1) (A40-A41).

Coletto testified to two apparently unwitnessed conversations with De Ronde, one "about two weeks after he signed" his union card (A105), dated June 7, 1973 (also unexplained—it seems clear Coletto was among the 6 original "maintenance helper" signers in February or March), and another, some two or three weeks after that, that is to say, sometime in late June, 1973 (A105). In the second or later one, Coletto testified De Ronde told him, "if" the union got in, and "if" he'd have to pay certain salaries, he'd have to get more specialized men. Coletto testified to the ordinary tone of the conversation and that he told De Ronde it sounded "fair" to him (A106). Coletto was never asked by the General Counsel, and said nothing, about "hate", or promotional opportunities.

As for the rest of the Coletto 8(a)(1), he said De Ronde asked him if he signed a card, to which he unhesitatingly said yes (A105). Wholly apart from the fact that the men were constantly talking union in front of De Ronde, that only seven men were involved, so that De Ronde must have known who was with the union and who was not, we note the complaint charges no interrogation by De Ronde (see par.

16 of the complaint, A68) nor, so far as we are able to tell, does this Additional Violation No. 1 expressly term it an illegal interrogation. What is factually incorrect about this part of the alleged 8(a)(1) is that, as the ALJ has it, De Ronde's reply was, "Coletto could be (in) trouble because of such conduct" (A40-A41) (matter in parentheses supplied). Again, the testimony is misread. Coletto specifically denied De Ronde said he, Coletto, could or would be in trouble (A106). And, he himself explained that what De Ronde meant was "in respects to like already aggravation, about that sort of thing" (A107), in relation to which, Coletto confirmed, De Ronde made no mention whatever of the maintenance helpers (A107).

The Cannon 8(a)(1)—Alleged Threat of Unlawful Withholding of Benefits Because of the Union Activities of the Employees (ALJ's Heading "Additional Alleged Violations of Section 8(a)(1)", No. 2) (A41).

Cannon testified (A127) to one of the many general discussions had with De Ronde, this one concerning promotion to the job of assistant to De Ronde, after having been rather obviously reminded about that by General Counsel (A126). He conceded that he could not have been considered for the job in any case and so, the alleged comments of De Ronde could not have been directed to him (A127). After a couple of questions, he was asked if he recalled what De Ronde said and had to be reminded—again—that the question was directed to the post of assistant to De Ronde. The answer, then, was,

> "That it would be filled while the union business was resolved, until they had decided what would be done about the union" (A127; obviously, the main typo here was the omission of the word, "not", before the word, "filled").

As noted, the effect of Cannon's testimony was such that the ALJ stated he did not know why Cannon was called

(A127). And, even General Counsel referred to Cannon's testimony in conjectural terms, to wit, it "may be a threat of denial". Cannon continued to have considerable difficulty remembering the purpose of his testimony, but, after still again being reminded, this time by the ALJ, his testimony (at A133) as to De Ronde's remarks was:

> "* * * that there would be no filling of the job—while this union business is being—going on, and until it is resolved, we will appoint a chief" (presumably, "we will not appoint an assistant to the chief", De Ronde) (matter in parentheses supplied).

At A134, after reiterating he doesn't know who started the conversation, Cannon was asked if De Ronde said the position of his assistant would be filled if the union lost. Cannon's answer was:

> "He did not say, he said after the union question was resolved, then it would be filled."

This being Cannon's testimony, we are now in a position to appraise more precisely what the ALJ extracted from it, at A41 (No. 2).

Firstly, there is a variance from the bill of particulars (cf. the ALJ's comment with respect to his treatment of such variations, at A42, subparagraph 1, not to mention subparagraphs 2 and 3, which also apply here). General Counsel says, in front of the witness, this conversation took place in March (A131). Brandt testified to a conversation about promotions in June, after the first R-case decision came down (A146). Cannon, admitting he can't pinpoint the date, fixes the conversation he had such difficulty in remembering in the first place as "maybe April" (A133), although it is an altogether reasonable inference that either the union "instigator" or Brandt, the 8(a)(3), got their dates mixed up, whereupon the ALJ found an unfair labor practice on each date. To repeat, Coletto, on the stand, was not even asked about this; again, none of the others were

called, including subpoenaed Roudabush. And, out of this state of the testimony, the ALJ finds an 8(a)(1), notwithstanding Cannon was making clear that De Ronde said no promotions would be made until the union business was resolved or settled.

Cannon was never asked by the General Counsel, and said nothing, about "hate", or loss of jobs.

Argument With Respect to the Brandt, Coletto and Cannon 8(a)(1)s.

Let us take the Cannon 8(a)(1) first (No. 2, at A41).

We have already demonstrated that the evidence is uncontradicted that De Ronde did not initiate these general discussions in one of which the Cannon 8(a)(1) is sited, that the ALJ culled out a selective part of one of Cannon's sentences, and that Cannon repeatedly explained that De Ronde's point was that no promotion would ensue until the union business was resolved, that the ALJ had some doubt as to why Cannon was called in the first place, and that General Counsel himself had it that Cannon's testimony only "may" be a threat of denial of promotional opportunities (A127). We say, the testimony does not reflect an unfair labor practice at all. We may even ignore all the adverse inferences to be drawn (*Interstate Circuit* v. *U.S.*, 306 U.S. 208, 225-226, 83 L. Ed. 610; see, also, *N.L.R.B.* v. *Ford Radio & Mica Corp.*, 2 Cir., 258 F.2d 457, 463; *Standard Beverage, Inc.*, 216 NLRB No. 53, Jan. 28, 1975) by the availability of corroborators and their not being called.

This Circuit has noted that unilateral, economic benefits may not be granted by an employer during an organizational campaign, under threat of 8(a)(1) findings. Accordingly, it has held, it would be illogical to find an employer guilty of an unfair labor practice if it withheld economic benefits during an organizational campaign (which was actually in effect in April, 1973, the time found by the ALJ in which the De Ronde comments were made, A41). Such a " 'damned if you do, damned if you don't' approach by the

Board hardly furthers the policies of the Act" (*N.L.R.B.* v. *Dorn's Transportation Company*, 2 Cir., 405 F.2d 706, 714-715).

We do not have to look far to appreciate the applicability of the quoted statement. Mays has been found guilty, below, of an 8(a)(1)—to be discussed shortly—for offering Gribbins an assistant display manager's job (A27, fn. 35), so that we are quite literally "damned" both ways, in this very case. Nor can it be gainsaid that this is one of those "isolated and vagrant" statements referred to by this Court in *Bon-R Reproductions, Inc., supra,* at pp. 903-904 of 309 F.2d.

As regards the Coletto 8(a)(1), we have stated we really are not certain whether this encompasses De Ronde's asking him whether he signed a card, mentioned in the course of an 8(a)(1) finding by the ALJ (A40-41, No. 1). The brief of the Board makes mention of this as a "coercive interrogation", at page 12, and yet, while the Board's brief neglects to say so expressly, this appears to be the "one instance" where the "questioning" was not coupled with threats (see p. 13 of the Board's brief). On the other hand, not only is there no charge of interrogation by De Ronde, but also, neither the complaint nor the reply to the motion for a bill refers to any interrogation at all by De Ronde, much less one of Coletto. The only interrogations alleged are by Hord and Schob (compl., par. 16, A68) and, consistent with the heretofore noted General Counsel's usual practice, our request for the identity of those questioned was rejected as "evidentiary", a rejection which was upheld (see par. 6 of the demand for a bill, A76-A77; reply, par. 6b, A85; see the ruling upholding this in the usual form language, at A88-A89).* To add to the problem, Exception No. 5 of General Counsel, to the ALJ's decision says this:

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* It is appropriate at this point to note that this sort of variation was practiced throughout the hearing. Apart from our complaining of the difficulty in tying in General Counsel's proffered testimony with the relevant sections of the complaint and reply to the motion for a bill (see, e.g., A128, A129-A130, reproductions of the highly garbled transcript at that point), we noted, albeit to no avail, several discrepancies between the said reply and the evidence.

"5. The Judge failed to find that in or about late June, 1973, after interrogating employee Frank Coletto, and soliciting an admission of union card-signing, supervisor De Ronde told Coletto that he was, or could be, in trouble; and that this statement constituted a threat of reprisal by Respondent in violation of Section 8(a)(1) of the Act."

Apparently, General Counsel is complaining that the ALJ incorrectly restricted himself to finding an 8(a)(1) solely in the alleged, conditional "threat" to get specialized help, "if" the union came in and "if" higher salaries were negotiated. This is incorrect in any event, since the Coletto 8(a)(1) already included the "threat" of "trouble", to the alleged omission of which General Counsel is excepting. But, we see that General Counsel still does not appear to be treating the question as to signing the card as an interrogation in violation of 8(a)(1), notwithstanding what the Board is now saying in its brief.

This confused situation is the result of the practice, tolerated by the Board, of throwing in the usual potful of

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Upton, for example, was being questioned about alleged surveillance of Gribbins and her by store detectives in April, 1973, two months before they even joined the union (cf. par. 14 of the complaint, A68). The reply to the motion for a bill (see par. 4b, A84) set forth surveillance by the detectives in August, 1973. Our motion to strike was denied, even though General Counsel practically admitted it was not competent, indeed, offering to discuss an amendment to the complaint (A111, also reflecting a highly garbled transcript). The theory of the denial was that, even if the variance was ineffectual to prove an 8(a)(1), it could serve as evidence of an 8(a)(3), thus effectively enabling General Counsel to indulge in all sorts of variations. On the other hand, in the course of General Counsel's direct case, while we were cross-examining Dashefsky, the ALJ demanded and received from us a statement of the Company's position—encompassing all of the alleged 8(a)(3)s—because he could not determine how much of our cross-examination was "relevant" (A178-A182; see the prolonged discussion at A182-A187). We also again direct attention to the last full paragraph at A42, where the ALJ lists a variance from the bill of particulars as a reason for not finding other 8(a)(1)s.

uncharged 8(a)(1)s, refusing necessary particulars, expressly refusing to provide the names of those subject to, or the content of, the unfairs (cf. *McClain Industries* v. *N.L.R.B.*, 381 F. Supp. 187), the ALJ's establishing a basis for tolerating variations from the bill of particulars, and proceeding in any old sequence selected by General Counsel. The question concerning the card signing, allegedly asked of Coletto by De Ronde, was simply thrown in, with no indication then and now (save for the Board's brief here) that an 8(a)(1) coercive interrogation was being litigated here. This is improper procedure, a denial of due process, and, on this ground alone, unenforceable (apart from how it reflects upon the way this entire proceeding was handled) (*J. C. Penney Co.* v. *N.L.R.B.*, 10 Cir., 384 F.2d 479, 483; *N.L.R.B.* v. *Bradley Washfountain Co.*, 7 Cir., 192 F.2d 144, 149; *N.L.R.B.* v. *H. E. Fletcher Co.*, 1 Cir., 298 F.2d 594, 600).

Still another ground for denying 8(a)(1) status to this "interrogation" is this. We have already shown there was universal agreement that union conversations were continuously being held among De Ronde and his 7 people, that nothing happened to any of them save Brandt (for specific reasons, to be discussed), Colletto had not the slightest hesitation in answering a question put in an atmosphere of complete informality by De Ronde, so close to the men that he was the one asked by Cannon to relay the decision in the first petition to Brandt. We fail to see how, under these circumstances, such an interrogation, even if it did take place as Coletto says, complies with the severity of the standards for finding illegal interrogation enunciated by this Court in *Bourne* v. *N.L.R.B.*, 2 Cir., 332 F.2d 47. And, it is uncontradicted, once again, that it was "unconcerned" De Ronde who told the men that Mays had no right to fire them because they signed cards (A402) (*N.L.R.B.* v. *Dorn's Transportation Co., supra,* 2 Cir., 405 F.2d 706, 714; *N.L.R.B.* v. *Associated Dry Goods Corp.*, 2 Cir., 209 F.2d 593, 594-595, cited in *N.L.R.B.* v. *Sachs,* 7 Cir., 503 F.2d

1229, 1235 (adv.). There is not, of course, a scintilla of evidence that the question had any effect whatever on Coletto (*N.L.R.B.* v. *Sachs, supra,* at p. 1235).

As regards the finding that De Ronde told Coletto he could be in trouble because he signed a card (A40-A41), we pointed out that that was not the testimony, which reflected merely a generalized prediction of aggravation. As recently as December 16, 1974, the Board found no unfair labor practice in an employer letter sent to all employees, in the midst of an organizing campaign, urging them all not to sign cards and thereby avoid "turmoil" (*Airporter Inn Hotel,* 215 NLRB No. 156, overruling, in part, *Trojan Battery Company,* 207 NLRB No. 70). Here, of course, we have no such generalized letter, but only the comment of a low ranking supervisor, long involved in union discussions with his men, telling one person, in a most informal manner, about the possibility of ensuing aggravation. We further submit that, in addition to the foregoing reasons for finding no violation, we are confronted with still another "isolated and vagrant" remark encompassed by this Court's comments in *Bon-R Reproductions, supra.*

Finally, as regards the two "ifs" ("if" the union got in, "if" certain salaries were negotiated), not only did Coletto agree that De Ronde's saying he would get specialists was a fair comment, but also, we see not the slightest distinction in principle between this comment and the one by the supervisor to his men in *N.L.R.B.* v. *Wix Corporation, supra,* 4 Cir., 309 F.2d 826, 839, that the plant would close if the union came in. As was true there, here, too, there is nothing to show the statement represented anything but the personal opinion or speculation of the speaker. Nothing, not an iota of evidence, reflects policy participation by the man in charge of 7 maintenance helpers. In any event, the actual comment there that the plant would close is much stronger than the "implication" here "that less qualified employees such as Coletto would be terminated", given the two "ifs". And, going from two "ifs" to an implied threat

to dismiss Coletto himself constitutes building of "inference upon inference to reach a finding which is no more than educated conjecture", the precise procedure condemned in *N.L.R.B.* v. *Garner Tool and Die Manufacturing, Inc.*, 8 Cir., 493 F.2d 263, 267-268, and *N.L.R.B.* v. *Miami Coca-Cola Bottling Co.*, 5 Cir., 222 F.2d 341, 344. See, also, as to economic predictions not constituting violations, *Sinclair & Rush, Inc.*, 185 NLRB 25 and *T. M. Duche Nut Co., Inc.*, 174 NLRB 457.

The Coletto 8(a)(1), like the Cannon 8(a)(1) fails. We turn now to the Brandt 8(a)(1). It may be true that, since this unfair rests solely on the resolution of a credibility issue, the finding crumbles upon our demonstration that there was no such issue to resolve. However, our reluctance to add to this brief, and thus, to this Court's workload, must, we fear, give way to the need, as we see it, to exploit all we can in our client's interest. Accordingly, we probe further.

We have already pointed out the juxtaposition between Brandt's testimony concerning Katz's "hate" and the total lack of corroboration by those available, the inferences that should have been drawn with respect thereto but were not, and the juxtaposition between Brandt's testimony on the one hand concerning diminished opportunities for advancement, particularly his, and, on the other hand, the inevitability of the discharge of all of them. We pointed out that the ALJ misread the testimony, that even Brandt did not testify De Ronde said Katz had a "hate" for the union (Katz denied ever telling De Ronde he had a hatred for Brandt or the union, while his own wife is a union member, A285). But, most important, Brandt's own testimony disputes that finding. We direct attention to A169-A170, where he said, "hate" is a word, he might have misconstrued it, and De Ronde only "might" have said it, then saying, De Ronde did say it, actually, "All right, fine, leave it that way". But the ALJ refused to accept his flip flopping and told him he did not want to leave it that way. He said:

"We want to know whether or not De Ronde used the word 'hate' ".

While the record does not reveal Brandt's physical discomfiture, we think the testimony at A169 gives some indication of his reaction—he's not "quoting", he can't "recall", he won't "swear to it", it's "possbile", etc. And, in the end, despite the ALJ's finding, Brandt still did not say so (A170). He recollects a "statement went like that Mr. Katz had a great hate for all of us, in my recollection". Even the General Counsel did not accept this as an expression by De Ronde of Katz's hate, for at A175, this appears on redirect (the question is by General Counsel):

"You weren't sure you recollected this word, you weren't sure of it. Are you sure some statement along those lines was made, whether the word hate was used or another word? A. Yes, by Mr. De Ronde.

Mr. Miller: Objection.
Judge Cohn: Overruled."

The question we objected to not only disposes of ALJ's quote, at A8, but is also, we submit, plainly improper, leading, suggestive, and the overruling of our objection is plain error.

We have dwelled on this "hate" business, not because hatred is a necessary component of animus. We dwell on it because this was the express finding, by the ALJ, of the basis for the future discharge of the seven (which never eventuated) and because it reveals the testimonial proclivities of Brandt, only whose "clarity" is questioned by the ALJ, not his honesty or candor, while De Ronde is relegated to the scrap heap because he "appeared" to have a desire to please his employer.

Let us discuss that issue, baseless as it is.

First, De Ronde's "appearing" to try to please his employer. We shall have to wander off a bit into other areas

to be discussed more fully later but, be that as it may, how did De Ronde appear to try to please his employer? By testifying he told the men they could not be fired for signing union cards (A402)? By testifying he was unconcerned (the testimony of the unionized maintenance helpers themselves supports this) whether the union came in or not (A402)? By testifying he conveyed union messages between two of the union men (A406)? By complaining how difficult it was for him to operate without an assistant (A402)? (Klepack was appointed assistant some 4 weeks prior to the date of De Ronde's testimony, that is to say, around December 10, 1973, long after these events, A404). By testifying he didn't know about a printed solicitation rule, notwithstanding he knew the pamphlet in which it was printed (A423)? While again typical of the ALJ's proclivity for partial testimonial extractions which really distort the thrust of the testimony, as we shall see, the ALJ made quite a point of this (while ignoring what else De Ronde said about the subject matter) to justify the finding of Brandt's 8(a)(3) discharge (fn. 11, A11).

We now turn to Brandt's "honesty and candor" (A8).

Brandt's "hate" testimony has been discussed. Additionally, the ALJ finds Brandt lied to Katz when he denied any union involvement on June 7, when he was told by Katz, inter alia, he may not solicit on the floors, and may not stop the work of others by so doing (A9). While the ALJ cannot bring himself to use the term, "lied", he does find that Brandt "acknowledged" in his testimony he had been soliciting during working hours and on the selling floor prior to June 7 (A12). Actually, Brandt testified he organized 19 out of 25 people, but only whenever he was passing or "happened to be not working" (A142). But on cross, he admits he solicited while he was supposed to be working, but did not disclose that fact to Katz (he says he didn't lie to Katz—he just didn't tell him the truth, A159). We direct attention to his testimony on direct (A149) in detailing what Katz said on June 7, where he starts off by saying

Katz said he was not to be involved with the union, then modified it to Katz's talking about no solicitation on company time. Only on cross does it come out that Katz "may" have told him not to solicit on the selling floor, and that something "may" have been said about soliciting on his own time, and not on company time (A159-A160), only to admit later, quite definitely now, he was told not to solicit on company time (A164). (We point out here that the words "company time" were understood by all to mean "working time"—see A159.) He did not recall whether Katz told him where and when he could solicit (which Katz, the "hater", actually did, and which the ALJ actually found, A9, A267-A269).

Of this disparity between Brandt's direct and his cross, the ALJ took no notice.

At A163, Brandt reverts to the position that he never stopped his job to talk to anyone, while just a few pages back he admitted he did (the ALJ's findings, A12). At A165, he admits he was careful about his solicitation while he was on company time only after June 7—he was not that careful before June 7. He simultaneously has it that his organizational activities took place just about exclusively while he was in transit from one place to another, a plainly incredible statement for one organizing 19 people (A163), as any one familiar with organizational work will attest, except, of course, if he delayed going to where he was supposed to go (and assuming, incorrectly, that, while going from one place to another, he was not on working time). Why, if it took five seconds for the elevator to go from the basement selling floor to the second (top) floor, that's all he would spend soliciting (A164). He denied knowledge of any rule as to solicitation (A154), so that the question may validly be put as to why, so early in his testimony, he was careful to say he solicited only during lunch breaks, coffee breaks, or in transit—whenever he happened not to be working (A142), and to attempt (however unsuccessfully) to maintain that position. He testi-

fied Cannon told him he (Cannon) was fired (A165). We know no such thing happened, which does something to Cannon's credibility or, more likely, his. He said De Ronde never criticized his job performance (A139), but we learn that De Ronde did criticize his work, violently (A167), indeed, so violently that he apologized to De Ronde (A172-A173).

The Board has held it would overrule an ALJ's credibility resolution where the clear preponderance of all the relevant evidence indicates the ALJ's resolutions are incorrect (e.g., *Renato Achiro,* 215 NLRB No. 119, Dec. 16, 1974). Actually, it has gone further. In *Permaneer Corporation,* 214 NLRB No. 47, the Board stated, at page 6 of the mimeo, after noting the usual *Standard Dry Wall* case (*Standard Dry Wall Products, Inc.,* 91 NLRB 544, enforced, *Standard Dry Wall Products, Inc.* v. *N.L.R.B.,* 3 Cir., 188 F.2d 362), and after noting, in relation to the testimony of an alleged 8(a)(3), that such an alleged dischargee has a major interest in the outcome of the proceedings:

> "An Administrative Law Judge cannot simply ignore relevant evidence bearing on credibility and expect the Board to rubber stamp his resolutions by uttering the magic word, 'demeanor' ".

No reason exists why a Court of Appeals should engage in such rubber stamping either, notwithstanding the Board's affirmance. There is no special area of labor competence or expertise involved. The Board sees a cold record—so does this Court.

We could hardly presume to lecture this body on *Universal Camera Corporation* v. *N.L.R.B.,* 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed. 456. But, we may delineate the Supreme Court's comment, at p. 490 of 340 U.S., that:

> "The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's

> decision from being justified by a fair estimate of the worth of the testimony of witnesses * * * ".

It is true, of course, that the *Universal Camera* opinion issued in the context of the Board's reversal of an examiner's findings. Notwithstanding, nothing in the opinion limits the right—or the duty—to ascertain whether the findings of the Board are "supported by substantial evidence on the record considered as a whole", even if the Board goes along with an ALJ's findings, inclusive of credibility resolutions. This Court, we submit, is not irrevocably bound by credibility resolutions and, if it "cannot conscientiously find" such support, the Board's findings must be "set aside" (*Bon-R Reproductions, Inc.* v. *N.L.R.B., supra,* 2 Cir., 309 F.2d 898, 903), a posture even more susceptible to adoption where, as here, the Board incorrectly applied its own standards.

The ALJ said Brandt appeared to attempt to recall the events with honesty and candor. We have demonstrated the evidence is overwhelmingly contra. He said De Ronde appeared to wish to please his employer, whatever that means. Not only have we shown that much of his testimony was displeasing but also, we do not know how else De Ronde could have avoided his "appearance", so far as this ALJ was concerned, except by testimony completely antagonistic to the employer. Then, and only then, we take it, De Ronde would not have appeared to be trying to please his employer. We have shown how the ALJ misread the "hate" testimony. We have shown the availability of corroborators but who were either not called or if called, did not verify the Brandt testimony, without any inference being drawn by the ALJ, or the Board. We compare that to the picayune, irrelevant, and inaccurate notation of failure of corroboration on the part of Kreiner and Igloi, at fn. 37, A28. We compare that to the reference to the lack of corroborative evidence with respect to complaints about Brandt's unsatisfactory lamping work (fn. 8, A9), although

not only De Ronde (as the ALJ would erroneously have it, A9) testified that Brandt apologized for his derelictions, but also, Brandt himself testified to that (A172-A173), which ought to be corroboration enough. With all this, no inference is drawn against the truth of Brandt's story (see, as to disparate treatment, *Poultry Enterprises* v. *N.L.R.B.*, 5 Cir., 216 F.2d 798, 800-801, and the role such treatment plays in a Court's appraisal of the substantiality of the evidence).

This latter point, by the way, is frustratingly exacerbated by the practice, engaged in by General Counsel, of demanding all sorts of documents at the hearing, even those he knew existed prior to the hearing, and which he did not subpoena lest, we presume, in violation of the secrecy approach adopted by the General Counsel, the very subpoena could disclose more precisely who or what he was talking about (e.g., Lynch's statement, see A328). We complied, because the ALJ suggested he would draw adverse inferences from our failure to produce them (A276-A279; A310-A312; A317-A318; see A322-A324; A328; A385-A386; A393; A447-A448).

Notwithstanding what looks like specifics in referring to Brandt's appearing to recall with honesty, De Ronde's appearing to want to please the employer, the ALJ, we suggest, has in fact made a generalized demeanor finding which, as the Board has ruled, is but one of the factors to be taken into account in resolving credibility issues (*Harvey Engineering*, 209 NLRB No. 95; see, also, the comments of Judge Friendly in *I.U.O.E.* v. *N.L.R.B.*, 2 Cir., 321 F.2d 130, at fn. 1, p. 138). The evidence contra, in this case, is just too much to permit the "rubber stamping" of a credibility resolution in favor of the testimony of an alleged 8(a)(3) dischargee with so major an interest in the proceedings (*Permaneer Corporation, supra*, 214 NLRB No. 47). On the other hand, if it be deemed a generalized demeanor finding was not made by the ALJ, but that he has

articulated other than a demeanor basis for resolving the credibility issue, then, of course, the importance of the demeanor factor is greatly diminished, and an independent appraisal of the evidence in support of the resolution is warranted (*Poinsett Lumber,* 147 NLRB 1197, 1198).

As regards this Court, we emphasize that it is not being asked (in a credibility resolution dehors the Board's area of expertise) to "displace the Board's choice between two fairly conflicting views" (*Universal Camera Corp.* v. *N.L.R.B., supra,* 340 U.S., at p. 488). Nor is it being asked to abandon what it suggests may be a more "self-denying" practice vis-a-vis inferences (*N.L.R.B.* v. *Marcus Trucking Co.,* 2 Cir., 286 F.2d 583, 592). There are no two fairly conflicting views as to the credibility resolution, in the light of what has been adduced.

To sum up, regardless of the respect this Court normally accords credibility resolutions below, that respect is not merited here. And, this is wholly apart from the salient point that the resolution is worthless, because expressly predicated on an alleged testimonial conflict demonstrated to be non-existent.

It remains but to note the following with respect to this Brandt 8(a)(1). De Ronde's alleged statement did not purport to reflect his wishes or intentions. It purported to reflect Katz's. In *Las Vegas Sun,* 209 NLRB No. 38, the Board refused to issue a remedial order where a friendly foreman told his men, during an organizational campaign, the company would make things so miserable for them, they'd have to quit. Applying the thrust of that holding, even if Brandt's testimony is assumed (solely arguendo, of course, for we don't believe it for a moment) to be honest, we suggest that testimony does no more than prove that De Ronde was merely relaying his forebodings, instead of threatening the men with whom he was on friendly and familiar terms (*N.L.R.B.* v. *Dorn's Transportation Co., supra,* 2 Cir., 405 F.2d 706, 714; *Henry I. Siegel Co.* v. *N.L.R.B.,* 2 Cir., 328 F.2d 25, 27).

The Brandt 8(a)(1) fails.

The Brandt 8(a)(3) and 8(a)(4)—Alleged Discharge of Brandt to Discourage Membership in and Activities on Behalf of the Union in Violation of Sec. 8(a)(3) of the Act; Alleged Retaliation for Brandt's Giving Testimony in the NLRB Representation Matter, in Violation of Sec. 8(a)(4) of the Act (A13-A14).

Katz, vice-president in charge of store operations for Mays, covers all the stores and supervises all store operations, inclusive of those involving the personnel and labor-management relations of all stores; all store managers report directly to him (A259). He first learned of Local 30's campaign in Massapequa through Kaye, the Massapequa store manager, in March, when Kaye told him he had received a petition from the NLRB—manifestly, the first one, 29-RC-2202, G.C. 2a (A271-A272). He instructed Kaye to keep in touch with him on developments, while attorney consultation would be maintained, so as to proceed thereafter on their advice (A272). Mays put out no letters or literature regarding opposition to the union (A272).

After that petition was dismissed, as we now know, Brandt became the leader in approaching the others—in departments other than his own—on G.C. 2e (A90), soliciting, "about" 25 people, "some" 19 successfully (A142), admittedly stopping his work, certainly prior and up to June 7, to solicit (A159).

Katz received a report from Kaye that Brandt had been continuously soliciting personnel on the selling floor during store hours and on his (Brandt's) working time (A267-A268). While it is Mays' position that Katz, the "hater", could have properly discharged Brandt at that point, he did not do so. Mays' attorneys had previously advised Katz to be most cautious, to lean over backwards, in that the union would seek to create problems (A284). Accordingly, Katz, instead of discharging Brandt, called the attorneys, was advised what to say to Brandt, indeed, taking notes so as to insure compliance with their advice. (It will be recalled that, even apart from his soliciting,

Brandt had testified for the union on May 2, during the first R-case hearing, so there was no question as to his union proclivities). Of course, we now know Brandt did not tell the truth about his involvement (A9). Katz, Kaye, and De Ronde, all present when Katz had Brandt come to Kay's office (A268), testified Brandt, when confronted with the charge, smirked and said, "Who, me?"—"as though he didn't know he'd been doing this" (A269; see, also, A299; A405-A406).

Katz then told Brandt that he was not to solicit on the selling floors, working time was for work, that he was not to interrupt his working time to solicit, and that he was not to interrupt the work of others. However, he did not stop there. He went further, and affirmatively told Brandt where he could solicit—subject to the foregoing limitations, he could solicit in the parking lot, the locker room, and the lunch room. He told Brandt that this constituted a warning and that any repetition of this prohibited solicitation would lead to immediate dismissal (G.C. Ex. 13, A92; all Mays' witnesses testified to this and the ALJ, undisturbed by the Board, so found, A9). Katz wrote up G.C. Ex. 13 and put it in Brandt's file (A269). Significantly, no unfair was found in any of this.

The next incident took place on June 11 (the union conversation between Gribbins and Brandt in the hardware department on the selling floor, first floor, on June 11). The facts of the incident, while much stronger than the ALJ has them (A9-A10), will not be questioned here. We most certainly do contest the ALJ's treatment of those facts. For now, however, we delineate only this.

As previously set out, the ALJ speaks of the absence of corroborative evidence to support Brandt's delinquencies. Brandt's own testimony shows how busy he was organizing, instead of working. More significantly, the ALJ seems to ignore that the best corroboration lies in his own finding of Brandt's apology.

Equally, if not more significant, Katz, the "hater", who now had a most excellent opportunity—again—to get rid of Brandt, did not do so. He told De Ronde to give Brandt a warning, notwithstanding De Ronde, upon later reflection, wanted to terminate him (A420).

We must digress a bit here. In the case of Dashefsky (no discriminatory discharge found), the ALJ lays great emphasis upon the fact that Mays had an excellent excuse to rid itself of him but did not do so (A19). An excellent reason for discharging Murphy arose, but, instead of doing just that, Kaye tried to explain that it was part of Murphy's job (A22). Additionally, Murphy, on his day off, entered the store via a forbidden entrance, on June 14, but instead of being dismissed, he was merely warned (A21; see the Board's reference, with approval, to Mays' security concerns, and its rules, for example, as to employee entrances, A54). Any number of opportunities to dismiss Gribbins arose because of her constant griping about transportation, her conduct at Levittown in June (A51), her violation of the display rules (A51-A52), her carrying a handbag on the floor—not a "purse"—against the rules of the store (A32). Out of all this, she got a warning (A32). After her return from the June Levittown assignment—the manager there did not want her in his hair—she got a raise (A51; A54). All this is amazing conduct for a company with "extreme hostility toward the union" (fn. 46, A36), engaged in an anti-union "counter campaign", to "rid itself" of union devotees (fn. 14, A13).

Returning to the June 11 incident, the ALJ does not find from all this that De Ronde was extra careful with Brandt, or that Katz leaned over backwards as per the attorney's advice. He finds the incident "appears somewhat contrived", whatever that means (either it is contrived or not, and the evidence is conclusive, not just overwhelming, that it was not), and that it's mighty peculiar that De Ronde should rethink the matter, feel his authority and prestige

threatened because of Brandt's lies and derelictions (A9-A10). Why would he involve Katz "with such a relatively minor breach of work performance", an appraisal, the law is crystal clear, simply not within the province of the ALJ to make even if the circumstances were not as overwhelmingly impelling as they were (nor is this the only time the ALJ said this—he also termed Gribbins' derelictions "mere" failures, T1357). Why would De Ronde, indeed, not feel compelled to consult with Katz, since it was known that Brandt was now the chief solicitor for new cards? So, on this incredible basis, the ALJ (undisturbed by the Board), finds precisely the reverse of what happened—these facts, plus the other evidence he will advert to, "appears to confirm" General Counsel's argument that Mays engaged in a counter campaign "to rid itself" of the maintenance men who started the union campaign (fn. 14, A13). And this, although Brandt is the only one of them who was dismissed (or with respect to whom a charge was filed).

The ALJ says he gives no weight to the June 11 incident as regards Brandt's dismissal on June 13, since Respondent relies exclusively on Brandt's breach of its no-solicitation rules (fn. 14, A13). Here, too, is still another of the blatant misreadings of the testimony of which the ALJ is guilty. When the ALJ interrupted our cross-examination of Dashefsky, in the middle of General Counsel's direct case, to obtain our defenses, we told him "Brandt was discharged by Katz after openly ignoring his 'very careful warning'" (not to solicit in the manner hereinbefore mentioned) (A180). At A417, we repeated, Brandt was discharged for violating specific instructions given him by Katz. The questions by the ALJ as to light bulbs had to do with whether Brandt was discharged for not doing his "lamping" properly. To that, we answered negatively—Brandt was not discharged for that, in other words, for poor lamping. Brandt himself testified Katz told him he was dis-

charged for disregarding Katz's warning about solicitation while he was supposed to be on the job (A156).

We twice put it, then, that Brandt violated Katz's direct order. Brandt corroborated that was the reason given him for his dismissal. In the face of all this, the ALJ has it that "our contention" is, Brandt was discharged solely because he breached a no-solicitation rule, which leads the ALJ to accord no weight to the June 11 incident. The June 11 incident is, however, entitled to weight, great weight, actually, because, just as the ALJ himself noted vis-a-vis Dashefsky (A19), here again is a chance to rid itself of the union organizer vis-a-vis the second petition and not availed of, despite a "countercampaign".

Brandt was dismissed by Katz on June 13, 1973 (A10). The ALJ states that the June 12 incident, involving Strayhorn, and which triggered the dismissal, does "not provide a sufficient and valid basis for the imposition of the rule" (A13), that is, Mays' "no-solicitation" rule. He describes the incident, "testified to by Florine Strayhorn, a witness for Respondent", by saying it took place apparently during the lunch hour, not on the selling floor, and did not interfere with the work of the matron. Those are the reasons the rule would not apply.

Unhappily, the testimony is again misread and misinterpreted. The lunch hour is irrelevant—neither Brandt nor Strayhorn were at lunch, nor, obviously, does the store close at lunch time. Strayhorn said she was on her way to relieve one of the matrons (she is a supervisor of matrons, A398), for lunch (A396), while Brandt's testimony was that it was in the morning (A161). The solicitation took place in the basement (one of the three selling floors, A114, A164), near the housewares department (A398), another point in Strayhorn's testimony (on which testimony the ALJ seems to be relying) the ALJ somehow misses. Strayhorn did tell Brandt she was not interested (A397), but nowhere is there evidence, as the ALJ would have it, that that consumed the entire time—not an iota of

evidence supports that. She said the conversation lasted 5 minutes (T1131). Brandt started to say, for rather obvious reasons, we suggest, that when he asked her if she were joining the union, she replied that she was not because she was

> "deathly afraid of saying anything about unions. Her past history, the first word of union you got fired.
>
> * * * * *
>
> Q. Did she say that? A. Yes. [illegible]e said that. Q. Do you know whether s[illegible]? A. No. I didn't talk to her that long" (A[illegible]

What is clearly revealed by this is not merely the usual testimonial proclivity of Brandt. More importantly, what is revealed is that Brandt suddenly realized this sort of conversation would be taking some time. So, in a flash, he simply reverses himself, and then asserts the talk didn't last "that long". This, the ALJ (and Board) ignored—or, possibly, purported to sweep away by use of the semantics employed to describe Brandt's testimony, to wit, "not always the epitome of clarity" (A8), thereby "supporting" his credibility resolution as between Brandt and De Ronde.

Katz confronted Brandt with this on June 13, again after consulting counsel. De Ronde was present, as was Zayle (Kaye's assistant). Brandt again came forth with this "who, me?" type of denial, Katz did not believe it, and dismissed him (A270; see, also, A412, De Ronde; Zayle was present because Kaye was off that day, A270—his testimony is at T1328-1329). The ALJ found Brandt's dismissal was in violation of Sec. 8(a)(3) of the Act, and, "it may reasonably be inferred" (A13), a dismissal in retaliation for Brandt's giving testimony in the first R-case hearing, hence in violation also of Sec. 8(a)(4) of the Act (Member Kennedy dissented from this latter Sec. 8(a)(4) finding, fn. 3, A55).

Argument With Respect to the Brandt 8(a)(3) and 8(a)(4).

Preliminarily we admit to some confusion over the ALJ's "analysis", commencing at A10. At this point, we pass over the 8(a)(4), as we do his erroneous statement of Mays' contention as to the reason for Brandt's dismissal.

The ALJ divides his discussion into two parts. Part one starts by questioning whether there was a rule in existence during the Brandt incident. While apparently conceding, however reluctantly, there was a valid no-solicitation rule prior to September, 1972, he notes the pamphlet was temporarily halted at that time because of a problem involving litigation with a government agency over some non-related contents (vacation pay provisions, actually, A264). He then states that, "although Katz testified" new employees received instructions orally as to no-solicitation, "there is clearly a lack of substantial evidence" the employees knew about the rule in 1973 by citing, as "one" example, De Ronde's testimony (A11). Finding solicitations for other matters—none related to unions—he concludes the "rule" was not enforced until the union appeared, and therefore finds the rule was discriminatorily applied to Brandt (A12). We gather this means we either discriminatorily resuscitated an abandoned rule or else we engaged in the unfair labor practice generally known as discriminatory application of a valid no-solicitation rule. If the latter be true, we point out this was neither charged, alleged in the complaint, or set out in the reply to the motion for a bill, thus raising the due process questions analogous to those raised in connection with the so-called interrogation of Coletto by De Ronde. Most likely—that's all we can say—he is talking about the resuscitation of an abandoned rule, because of the manner in which he starts part two of his analysis.

Part two starts, "but even assuming the validity of the rule" (A12), so that we have no choice but to believe that part one encompassed no such assumption, that there was at one time a valid rule, but that it was abondoned. Part

two is decided on the ground that, even conceding the validity of the rule, it was Mays' burden to prove it was "motivated by legitimate objectives" in terminating Brandt (A12), citing *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (fn. 13, A12). He finds Mays did not sustain its burden because the Strayhorn incident was too minor. It did "not provide a sufficient and valid basis for imposition of the rule", even if the latter is a valid no-solicitation rule (A13).

As for the first part of his analysis, dealing with knowledge of the rule, the testimony is virtually unanimous no one was allowed to stop work for personal or private reasons, which, we insist, include union solicitation.* Not only did the employer witnesses so testify (Katz, A285; Tedeschi, second floor manager, A360; Turner, a saleslady, A362; Zinkofsky, assistant to Zayle, the assistant store manager, A427; see, Manzi, display manager at Massapequa, A430; Poma, personnel manager at Massapequa, A434, A436; Zayle, A446), but also, so did union witnesses (Upton, A118, to the ALJ, a "candid and honest witness", A40; Dashefsky, A177-A178; Fazio, A189). Moreover, not only Katz, as the ALJ would have it, but also, Poma, the personnel director in direct charge of such matters, testified that the rules (including the no-solicitation rules) were and are orally conveyed to new employees since R. Ex. 4 (the handbook of rules, A95) was temporarily halted (A433-A434), in September 1972. Most important of all, we think, is that Brandt himself knew the rules, too, and implicitly, albeit

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* Indeed, one may validly question whether such a rule is even necessary, unless working time is no longer for work (*Peyton Packing Company*, 49 NLRB 828), nor are we talking about no other opportunities to solicit. This store has a vast parking lot, actually used for meetings (e.g., A125; A156), with the cafeteria and locker room expressly available to Brandt and others, as Katz told him, not to mention the possibility of 8(a)(2) charges against Mays for permitting—and therefore subsidizing—union solicitation by employees during working time (see *N.L.R.B.* v. *United Steelworkers*, 357 U.S. 357, 363, 2 L.Ed. 2d 1385, 78 S. Ct. 1268).

none the less forcefully, admitted he was not allowed to stop work to solicit, particularly in the selling areas of the store, where the public goes. He finally admitted his dereliction only when pressed, but otherwise, as his testimony shows, he was most insistent that he solicited only while on the escalator, on the elevator, the stairs, the cafeteria, etc., whenever he was passing or "happened not to be working" (A142). We submit this constitutes nothing less than a plain acknowledgment by Brandt that he knew he was not allowed to solicit on his working time or on the selling floor. (So much, then, for the statement, at page 16 of the Board's brief, that the record is "devoid of evidence that the Company had a no-solicitation rule that was communicated to the employees * * * ".)

Out of all this, the ALJ finds "there is clearly a lack of substantial evidence in this record that employees were aware in 1973, that such a rule existed" (A11) and, to prove this, he selects, again distorting the testimony, De Ronde's statement, as an "example" (implying, erroneously, the existence of others), he didn't know there was a rule against solicitations prior to Katz's direction to Brandt. The ALJ neglects, however, to mention that De Ronde recognized the pamphlet and the rule when it was shown to him (A423), and that the ALJ abruptly stopped our questioning as to whether he took it seriously (A424). (This is, we recall, the De Ronde who, according to the ALJ, tried to please Mays by his testimony.) Even more, the ALJ neglects to mention that De Ronde set up the equivalent of a no-solicitation rule applicable to his men, including Brandt, by requiring they do their work and report right back to the shop (A400; A421).

We suggest, precisely contrary to the finding below, the evidence is more than overwhelming—it is conclusive—that the employees, including Brandt, were absolutely aware in 1973, before and after Brandt was warned, they had no right to engage in the type of solicitation engaged in by Brandt.

The ALJ next says (we are still in part one of his analysis) "the record is replete with evidence" of other solicitations. The record is replete—but not as to the miniscule other solicitations which existed—because the General Counsel brought the matter up with just about every one of his witnesses, starting with Upton (A112). But the uncontroverted testimony is that all charitable solicitations are controlled by Katz, from central headquarters (A283; A287; A318). Not even an outside cannister can be used without his approval. Additionally, as a community store (A274), Mays' Massapequa participates in the community campaign. How often? Once surely, during 1973 (A284), while there may also have been a Heart Fund Drive. In October, 1973, after the events in question, a meeting was held when the Arab-Israeli war broke out—manifestly, a one-shot affair (A319). The United Fund affair was held at 9:00 a.m., in the cafeteria, as was the Heart Fund meeting (A287), and the October War affair (A319)—the store opens at 10:00 a.m. No one is ordered to attend (A283-A284).

As for the MEA, Mays Employee Association, there is some solicitation, during working time, for flowers to send bereaved families, for condolences, and an occasional outing, but, generally, this is done before working hours, or during lunch, in the lunch room (A283). Moreover, all this is clearly not separate from Mays' own business interests, that is to say, these are not purely private matters. From this highly limited, strictly policed intrusion, for eleemosynary purposes in the great majority of cases and, it may be judicially noticed, practiced by almost all similar business organizations as a matter of almost required community relations, the ALJ finds the no-solicitation rules were not effectuated until the Union appeared. He says nothing about the fact that this was the first time work was stopped for such purposes, so that Mays had no prior occasion to call that rule into play (*Westinghouse Electric Corp.*, 204 NLRB No. 24). Moreover, the repromulgation of a no-solicitation rule at the outset of a union campaign,

at a time when employees are more likely to forget or disregard it, does not evidence an unlawful purpose, as the Board held, in reversing the then Trial Examiner, in *Veeder-Root Company,* 192 NLRB 973.

We note it is uncontested that Mays did not send out anti-union letters or distribute anti-union literature (A272) and, again, that, acting on the advice of the attorney, instructions were issued to bend over backwards to avoid incidents (A284). The baseless findings of an anti-union "campaign", by the ALJ—directed, however, only at the maintenance helpers (fn. 14, A13)—does not destroy these facts. Indeed, it is rendered even more baseless when we note this comes right after he finds it "curious" that De Ronde should ask Katz—precisely the one De Ronde should have asked—what to do about the then union leader. It is clear, as to the finding of a "campaign", the ALJ again engaged in precisely the sort of conjectural inferences rejected by various Court of Appeals (*N.L.R.B.* v. *Garner Tool and Die Manufacturing Co., supra,* 8 Cir., 493 F.2d 263, 268; *N.L.R.B.* v. *Miami Coca-Cola Bottling Co., supra,* 5 Cir., 222 F.2d 341, 344).

Nor do we have a situation here whereby the employer takes advantage of a no-solicitation rule, while imposing his anti-union views on the targets of the drive, although, even so, it does not follow that enforcing a rule in such circumstances constitutes an unfair labor practice (*N.L.R.B.* v. *United Steelworkers, supra,* 357 U.S. 357, 2 L. Ed. 2d 1385, 78 S. Ct. 1268, a case involving, simultaneous unfairs on a wide-scale, anti-union solicitation by the employer, and exceptions to the rule for charitable institutions). Interestingly, the Supreme Court stated (at pp. 363-364 of 357 U.S.) the Act does not mandate that the unions be protected in the use of all means to reach the workers, nor of the same means utilized by the employer, and cautioned against mechanical answers to these complex problems. It noted that proof of diminished ability to organize is a "vital consideration" in determining whether a no-solicitation rule is valid or whether the rule has been fairly

applied (see *May Department Stores Company* v. *N.L.R.B.*, 6 Cir., 316 F.2d 797). Despite this, despite the fact that this case, even as the ALJ has it, is far weaker than the one before the Supreme Court, the ALJ (and Board) have it that the few MEA solicitations under the circumstances set out, and this 2 per year community fund drives, participated in by this community store, held before store opening, so that most employees have not yet started their working time, constitute, in effect, a waiver of the rule, the result being that employees now presumably have the right to stop work, solicit for the union on working time, even on the selling floor, while disciplining them for so doing, after a clear and proper warning, is an unfair labor practice (presumably, it would also be an unfair if a commensurate reduction were made in their pay).

This is not the law. In an even stronger case than this one, encompassing employee social organizations, charity drives, a permissive attitude previously adopted toward talking, a flower fund request (supervisory warnings were also involved), a newly published rule against union solicitation on company property during working hours, found to be discriminatory by both the ALJ and Board, adoption of a special policy toward union solicitation, and warning of the severest sanctions for violation, the Sixth Circuit refused to enforce the cease and desist predicated on 8(a)(1) findings in turn predicated on the rule. The Court refused to enforce primarily on the ground that "this was the logical time" to issue the rule, adding that exceptions had been made sparingly, while interruptions for union solicitation purposes were by their very nature sources of potential for argument, dissension, and work interruption (*TRW, Inc.* v. *N.L.R.B.*, 6 Cir., 393 F.2d 771; see, also, *Westinghouse Electric Corp., supra,* 204 NLRB No. 24, and *Veeder-Root Company, supra,* 192 NLRB 973).

In *N.L.R.B.* v. *Wix Corporation, supra,* 4 Cir., 309 F.2d 826, at page 833, the Court said, as part of its argument for refusing to enforce 8(a)(3)s found by the Board with respect to three violators of a no-solicitation rule:

> "If the rule was enforced only as to these three, that fact is of no significance in this case, for these three are the only ones shown to have been roaming widely through the plant during work periods and engaging others in conversation. * * * Even if there had been no preceding instructions about it, an employee * * * hardly has a right to go roaming off on his own, indulging his personal pleasure * * *."

Taylor Instrument Companies, 165 NLRB 843, cited by the ALJ, was decided against a background, not only of very significantly changed rules (inclusive of a finding of an invalid no-solicitation rule), but also, of significant employer violations even after the change in rules. The Board, on the other hand, has frequently ignored minor and eleemosynary intrusions vis-a-vis no-solicitation rules (*Athens Pickle Company,* 181 NLRB 935; *G. C. Murphy,* 171 NLRB 370, where the Board pointedly refused to base its holding that a no-solicitation rule was unlawful on the fact that it provided exceptions for major charities).

So much, then, for what we have termed "Part One" of the ALJ's analysis.

As for Part Two (A12-A13), based on the ALJ's assumption of the validity of the no-solicitation rule, the ALJ (and Board) found the employer had not met its burden of showing he was "motivated by legitimate objectives" in effectuating Brandt's termination, citing *N.L.R.B.* v. *Great Dane Trailers, Inc.,* 388 U.S. 26, 34 (1967). The case is inapplicable.

In *Borin Packing Co., Inc.,* 208 NLRB No. 45, the Board cited *N.L.R.B.* v. *Winter Garden Citrus Products,* 5 Cir., 260 F.2d 913, where the Court said (at p. 916):

> "It is not and never has been the law the board may recover upon the failure of the respondent to make proof. The burden is on the board throughout to prove its allegations, and the burden never shifts. It is, of course, true that if the board offers sufficient evidence to support a finding against it, a respondent stands in

> danger of having such a finding made unless he refutes the evidence which supports it. But it is wholly incorrect to say or suggest that the burden of showing compliance with the Act ever shifts to the respondent. The burden of showing no compliance is always on the board. Even in cases of actual discharge, cases in short in which the respondent has taken affirmative action against an employee, this is true * * *."

Thus, the Board itself has not considered that *N.L.R.B.* v. *Great Dane Trailers* has altered its burden. That case was expressly labelled a synthesis of *American Ship Building Co.* v. *N.L.R.B.*, 380 U.S. 300, 85 S.Ct. 955, 13 L.Ed. 2d 855; *N.L.R.B.* v. *Brown*, 380 U.S. 278, 85 S.Ct. 980, 13 L.Ed. 2d 839; and *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. 221, 83 S.Ct. 1139, 10 L.Ed. 2d 308. (See, also, *N.L.R.B.* v. *Fleetwood Trailer Co., Inc.*, 389 U.S. 375, 88 S.Ct. 543, 19 L.Ed. 2d 614.) Not one of those cases involved the ordinary type of discriminatory discharge of an individual employee for union proclivities. Every single one of them involved some broad, economic, business measure clearly directed against union members and supporters in the course of a break in the relationship with the union. The clear direct thrust and effect of the conduct were per se targeted against the union and their supporters, so that the issues there boiled down to balancing motivation and business need against the effect on employee rights. In some cases, the "net" holding is, the effect is so great that, even given excellent business motivation, an unfair labor practice might still be found. In others of lesser impact, a showing of proper business motivation can be offset only by stronger proof of a predominant desire to hurt the union or its supporters. The point to bear in mind, however, is that the act in question is specifically targeted, business wise, against the union. Thus *Brown* involved a multi-employer lockout; *Erie Resistor*, superseniority to striker replacements; *American Ship*, a lock-out; *Great Dane*, vacation benefits to non-strikers and replacements, but not to strikers; *Fleet-*

wood, a general refusal to rehire economic strikers. The "discriminatory" conduct thus shown, it was then up to the employer to demonstrate—whether the effect was great or small—it was motivated by legitimate business considerations in applying such economic measures anti-union on their face.

We submit the very citation of that case reflects the ALJ's (and the Board's) error. We note the ALJ's citation is utilized to delineate the burden upon Mays to show Brandt's termination was "motivated by legitimate objectives," and he concludes the Strayhorn incident was too trivial to constitute such a showing. But we cited to the ALJ, and he himself quoted from, *N.L.R.B.* v. *McGahey,* 5 Cir., 233 F.2d 406, 413 (A20) (followed in *Borin Packing, supra,* 208 NLRB No. 45), in which appears critical reference to the Board's predilection for finding an 8(a)(3) simply because it believes the discipline disproportionate to the provocation. It is now settled, beyond the need for further citation, that that is none of the Board's business. Having shown, not only that the ALJ (and, therefore, the Board) misread the testimony relied upon (so that the provocation was in fact stronger than found), but also, that, in any event, there was a provocation, as is implicit in the ALJ's own findings (A13), it was no longer of relevance to go into the disproportion. In the *Great Dane* line of cases, however, there is the need to go into legitimate business considerations (that is to say, the need to explain the purpose of acts anti-union on their face, by showing they were "motivated by legitimate objectives," A12), the Supreme Court tells us, because of the limitations imposed by law upon the economic response delivered by management to counter the effect of, for example, a strike. Individual disciplinary cases are simply not encompassed by that principle, and by alluding to our need to sustain our burden that we were "motivated by legitimate objectives," and citing the *Great Dane* case in support of that proposition, the ALJ and the Board committed legal error, since, as we say, a violation on Brandt's part (small or not), was found. More pertinent is the

Board's holding in *Sumter Plywood Corporation,* 208 NLRB No. 87, where the Board said (at p. 2 of the mimeo):

> "We find merit in Respondent's contention that, under *Rubin Brothers Footwear, Inc.,* 99 NLRB 610, the General Counsel had the burden of proving that Steele did not engage in the misconduct alleged to have caused her discharge."

Thus, having found the alleged misconduct did in fact take place, not only are the ALJ's and Board's views as to disproportion irrelevant, but also, it was not our burden to show our motives were proper. It was the General Counsel's burden to show them improper, which burden was not met, in any case, but surely not met because, as the ALJ and Board found so erroneously, Brandt's discharge, ipso facto, shifted some sort of unmet burden to us (which we thoroughly met in any event). As recently as January 24, 1975, the Board held that, whether or not one Straka was engaged in concerted activity relating to drumming up support for his unconventional attire, he was properly discharged (this in the absence of any no-solicitation rules), because he conducted that activity during working time (*Midland Frame Division, Midland-Ross Corporation,* 216 NLRB No. 56; see *N.L.R.B.* v. *Colonial Press, Inc.,* 8 Cir., 509 F.2d 850, adv., involving issues concerning the reinstatement of, inter alia, six employees who had been "lawfully discharged * * * for engaging in 'long union meetings on company time' ").

The foregoing discussion was directed to demonstrating that, even under the ALJ's misstatement as to our reliance on the "rule," the conclusion reached was erroneous. As noted, however, the true reason for Brandt's discharge concerns what we repeatedly proclaimed to be Brandt's disregard of Katz's warning, a warning, we reiterate, not the subject of any unfair (and entirely proper, *Bonwit Teller, Inc.* v. *N.L.R.B.,* 2 Cir., 197 F.2d 640, cert. den. 345 U.S.

905, 73 S. Ct. 644, 95 L. Ed. 1342; *Essex Int'l,* 211 NLRB No. 112; *Stoddard-Quirk Mfg. Co.,* 138 NLRB 615).

Firstly, a threat to discharge employees for soliciting on employer's premises when they should be working is not an unfair labor practice (*Rubin Bros. Footwear* v. *N.L.R.B.*, 5 Cir., 203 F.2d 486, 487). We have already cited *Midland Frame Division, Midland-Ross Corporation, supra,* as permitting a discharge for so doing, even in the absence of a rule or a warning. Given a warning, the case becomes even stronger, involving, we suggest, insubordination as well as inattention to duty. In *N.L.R.B.* v. *Wix Corporation, supra,* 4 Cir., 309 F.2d 826, the Court said, at p. 833:

> "Even if there had been no preceding instructions * * * an employee * * * has no right to go roaming off * * * and to ignore * * * a supervisor's instruction to remain in his work area. * * * If he persists, * * * he is plainly insubordinate. * * * Whether or not the employer knew of their union adherence, it was not required by the law to submit to their insubordination", citing cases.

The Fourth Circuit had previously articulated similar views, to wit, solicitation "during working hours" is not protected activity, rule or no rule, and, after a warning, discharge for persisting is not in violation of the Act (*N.L.R.B.* v. *Empire Manufacturing Corp.*, 4 Cir., 260 F.2d 528, at page 529, citing cases; see, also, *Dobbs Houses, Inc.*, 145 NLRB 1565, 1570; *Peter Paul, Inc.*, 185 NLRB 281, 285). To threaten and warn of such discharge is thus not a violation of the Act (*Rubin Bros. Footwear* v. *N.L.R.B., supra*).

For these even more relevant reasons, then, the Brandt 8(a)(3) fails.

As for the Brandt 8(a)(4), the issue is plain. We say, flatly, that not an iota, not a scintilla, of evidence was adduced to support the required causal relationship between Brandt's testimony on May 2, 1973, and his dis-

charge. The mandated "canvass" of "the entire record," *N.L.R.B.* v. *Deaton*, 5 Cir., 502 F.2d 1221, adv., will disclose that. It will be recalled that Gambino, and Cannon, the then leader and known "union plant," also testified that day and nothing happened to them. Moreover, it is we who furnished the evidence as to who was on the presumed union target list, G.C. 2(e) (A439-A440) and it is we who introduced the evidence as to who testified on what date (A440). General Counsel not only made no attempt to do so, but also, he indicated he never even prepared himself to do so, stating he had not been "involved," and was in no position "either to verify or dispute" what we submitted (A440). What the 8(a)(4) case boils down to, then, is that Brandt testified at one time. More than a month later, with crucial intervening events, he was discharged, expressly on the basis of those events, on which the entire Brandt case was tried. Since that discharge was found to be a discriminatory discharge, it seems automatically to have followed ("reasonably" inferentially, the semantics employed below, to the contrary notwithstanding) that it was also a retaliatory measure in violation of Sec. 8(a)(4) of the Act.

This is plain error (Member Kennedy, once again, dissented on that point, fn. 3, A55). 8(a)(4)s do not flow from 8(a)(3) discharges simply because the dischargees testified in a prior Board proceeding. The law is clear that there must be some operative proof connecting testimony to discharge (*Mueller Brass Co.*, 208 NLRB No. 76;* *Martin Theatres of Georgia, Inc.*, 169 NLRB 108). And, without such proof, without an iota, actually, here being adduced, the ALJ (and the Board) should not have "reasonably inferred" Brandt's termination "was also in retaliation for Brandt's testimony" (A13-A14), for they have again indulged in plainly forbidden conjecture, *N.L.R.B.* v. *Garner Tool and Die Manuf., Inc., supra; N.L.R.B.* v. *Miami Coca-Cola Bottling Co., Inc., supra,* nor is such an inference in any way binding upon this Court (*National*

* Remaining unfairs denied enforcement, *N.L.R.B.* v. *Mueller Brass Co.*, 5 Cir., 509 F.2d 704 (adv.).

Football League Players Association v. *N.L.R.B.*, 8 Cir., 503 F.2d 12, 17, adv.). Thus, the 8(a)(4) also fails, as a matter of law.

We need not go into the Board's inapposite citation of *N.L.R.B.* v. *Scrivener*, 405 U.S. 117, to support its 8(a)(4) finding. Even a superficial reading of the case demonstrates the issue there had nothing to do with operative proof. That case was concerned solely with whether the Act's prohibition against retaliation for filing charges or giving testimony encompassed an affidavit given in the investigative stage.

The Murphy 8(a)(1)—Alleged Coercive Interrogation (fn. 24, A21).

The major significance of this alleged violation is that it typifies the blown-out-of-all proportion, and confusing, treatment of the simplest little incident, here, too, neither charged, nor set out in the bill of particulars. The only "coercive interrogation" attributed to Schob (par. 16 of the complaint, A68) appears to refer to the Lynch episode (to be discussed later). It would further appear, then, that this "coercive interrogation" was not encompassed by the complaint, thus giving rise, once again, to the same due process questions raised in connection with the Coletto "interrogation," and the "discriminatory application of a valid no-solicitation rule" point made vis-a-vis Brandt. In this instance, the confusion is compounded, because the General Counsel adduced no direct testimony whatever concerning the Murphy 8(a)(1). Murphy said nothing about it—apparently he had completely forgotten about this minutia, so that all the testimony came from us in the course of explaining why Brandt was warned on June 7.

When Katz was testifying as to how he learned about Brandt's soliciting activities while the latter was supposed to be working, he said Kaye told him, and showed him Schob's statement (G.C. Ex. 2, A91; A276). We produced it (under the usual threat of adverse inference) with a

challenge to General Counsel to put it in the record as his exhibit, which General Counsel refused (A277-A279). He was, however, permitted to interrupt his cross-examination, look it over, refuse to put it in, and then resume his cross-examination, notwithstanding our objection—overruled—that it was improper to conduct an investigation in the course of a hearing. While the exhibit was introduced later by the General Counsel, in the course of Kaye's cross-examination (A313-A315; renumbered to G.C. Ex. 12, at A321-A322), it is fair to say that not even General Counsel thought much about it or even considered it until later. The evidence comes from Schob, of course (and, as noted, is uncontradicted).

Schob is in charge of the porters (including Murphy) but so minor a supervisor he is "on the clock" (that is, he punches in), which is why Brandt tried to get him to sign a card too (G.C. Ex. 12; see Brandt, at A173-A174). On the morning of June 7, he and his men were on a coffee break, around 7:15 a.m., when Brandt, who was supposed to be working, came in, manifestly with a copy of G.C.2e, and solicited them in behalf of the union, for about 10 minutes. Later, Schob and two of his men (Storm and Newcomb) were in the dress department, on the second floor, when Brandt approached them again and tried to solicit them. Schob told Brandt that this was "working time," that he and his porters had to go. This took about three to four minutes (A370-A371). Later, Schob, noted that Brandt was talking to Murphy (who had stopped work) on the first floor, in the blouse department. The ALJ makes particular mention of the fact that "after they (Brandt and Murphy) separated, Schob asked Murphy what Brandt said" (matter in parentheses supplied). The ALJ's choice of semantics is less than accurate. The testimony is that when Schob saw them, he started over directly and Brandt left, obviously because he saw Schob coming (A371). Schob asked Murphy if Brandt was still talking union. Murphy said he was, after which Schob told Murphy to go back to work. That ended Murphy's involvement. The report to Kaye followed—but

concerned only Brandt's constantly soliciting people on the selling floor. Kaye asked him to write up what happened, which he did (A372). No one ever thought of Murphy, nor is there an iota of evidence that he was warned or reprimanded in any way, or that anything was put in his file, and, as we say, even Murphy seems to have forgotten about it, while the General Counsel at first didn't appear interested enough to want to put it in as his exhibit. Murphy was able to, and did, speak quite bluntly with Schob, addressing him by his first name, "Harry" (A248). Murphy, we recall, is the one who, after this incident, breached a security rule, but was only reprimanded, not discharged (R. Ex. 5, A96), and signed the reprimand. Shortly before that, he was seen engaged in conversation with Brandt during work time, outside, but nothing happened to him. The supervisor, Zinkofsky, gave Brandt a dirty look, "as if to say what was he doing there" (A257). Zinkofsky told Schob to talk to Murphy, in that he might be goofing off a bit. Schob did nothing—he didn't talk to Murphy at all, warn him, or threaten him (A377). Murphy flatly refused to operate a simple cleaning machine. The store manager carefully explained to him that it was part of his job—Murphy still refused (A22; A24). Indeed, Murphy testified that, when asked by Schob to operate the cleaner, he turned Schob down flatly, and invited Schob "to write me up on this." Then, Murphy testified, quite amazingly, "Harry" asked him if its O.K. with him (Murphy) if he did that (A252). In other words, the supervisor is asking Murphy for his consent to discipline him, and yet, out of this sort of relationship, out of all these circumstances, the ALJ still manages to find an 8(a)(1) coercive interrogation, and to work in some unfavorable innuendo even in the course of his dismissal of the Murphy 8(a)(3). We submit it is clear that Murphy was not the object of any unfair labor practices at all.

Argument With Respect to the Murphy 8(a)(1).

The ALJ relies on *Bourne* v. *N.L.R.B., supra,* 2 Cir. 332 F.2d 47, to support his finding that Murphy was sub-

jected, by this minutia, to what is converted, by grandiose terminology, into a "coercive interrogation." Our position is that the *Bourne* case (and others) mandate that no 8(a)(1) be found.

The ALJ says, "it may be reasonably assumed that Schob's interrogation of Murphy was for the purpose of eliciting information about that subject matter (Brandt's pro-union activities)" [matter in parentheses supplied (fn. 24, A21)]. Absolutely nothing in the testimony supports that self-described assumption. The testimony, uncontroverted, supports only that Schob, under the circumstances, eminently reasonably, sought to verify that Brandt was interrupting his porters' work by a continuance of his two prior solicitations that very day. Apparently, that had troubled the ALJ, too, for, in the hearing room, he asked counsel to brief the point as to whether such inquiries were proper (A384). We cited, then and there, *East Side Shopper, Inc.*, 204 NLRB No. 125 and also, in our briefs below, *Sarkes Tarzian, Inc.*, 169 NLRB 587. We submit those cases stand for the proposition, inter alia, that there is not the slightest impropriety in a supervisor's ascertaining whether those under him are or are not doing their job. Indeed, we suggest it is a supervisor's duty to do so (A369). Having had two experiences with Brandt's solicitations that day, one while his people were on duty, no question can arise as to the propriety of Schob's single question. Moreover, if, as the ALJ says, the purpose of Murphy's "interrogation" by Schob was to elicit information about Brandt's prounion activities, why didn't Schob do so? Why did he just ask Murphy, was Brandt talking union again and ask nothing more? He already knew Brandt was prounion (fn. 24, A21), so can it really be contravened that Schob's sole purpose in asking this one question of Murphy was to verify that this fellow was interrupting the duties of his men for other than a business purpose. The answer to this by the ALJ is clear. He "assumes" precisely the contrary, and again indulges

in forbidden conjecture (*N.L.R.B.* v. *Garner Tool and Die Manufacturing, Inc., supra; N.L.R.B.* v. *Miami Coca-Cola Bottling Co., supra*).

As for the *Bourne* case, that holds that interrogation not of itself threatening (not even the ALJ finds this) must meet severe standards to be held illegal. Is the inquiry informal, is it by a low level supervisor, is the reply truthful, so that no fear appears to have been generated, is there an existing pattern of discrimination (none at any time, we say, but certainly, none at this time, June 7—no charge alleges anything prior to June 8, and only the easily disposable Cannon 8(a)(1) was found to have preceded that date)? By all these tests, and "assuming," as did the ALJ, that one simple question under the circumstances shown, can be bloated into an "interrogation" in the first place, *Bourne* mandates that no violation be found. We suggest the ALJ and Board misconstrued *Bourne's* applicability.

The ALJ relied, for his finding, on the fact that no "assurance to Murphy against recrimination" was given by Schob (fn. 24, A21). Schob is a porter, not a logician, not a lawyer, and just as the Board found unnecessary and unrealistic (in another context) the "incantation of carefully constructed legal phrases" on the part of strikers invited to talk about reinstatement, so is it unnecessary and unrealistic to expect someone like Schob to articulate assurance "incantations" in a context devoid of any threatening or coercive intent (*The Colonial Press, Inc.*, 207 NLRB No. 114, enf. den. in part, *N.L.R.B.* v. *Colonial Press, Inc., supra*, 8 Cir., 509 F.2d 850, 857; *N.L.R.B.* v. *Dorn's Transportation Co., supra*, 2 Cir., 405 F.2d 706, 714; *Henry I. Siegel Co.* v. *N.L.R.B., supra*, 2 Cir., 328 F.2d 25, 27). And, here, too, we submit, is to be found still another isolated and vagrant question (*Bor-R Reproductions, Inc.* v. *N.L.R.B., supra*, 2 Cir., 309 F.2d 898, 903-904). Thus, the Murphy 8(a)(1) fails.

The First Gribbins 8(a)(1)—Alleged Coercive and Intimidatory Interrogation and Threat by Hord (A26).

The Gribbins matters, occupying by far the largest single portion of the record, the ALJ's decision, and the Board's, are here best delineated by comparing what the ALJ said, and what the Board said, in reversing the ALJ's findings of a surveillance 8(a)(1), the transfer and dismissal 8(a)(3)s, and the 8(a)(4). While it would take pages to detail all the differences between what the testimony amounted to, and what the ALJ extracted (appallingly underplayed as it is, fn. 46, A36, constitutes one example), the variations between the aforementioned recitals alone point up enough to verify our criticism of the ALJ's disposition of just about everything concerning Gribbins.

The 8(a)(1) here, allegedly occurring on or about June 11, is based exclusively on Gribbins' own story of an alleged warning by Hord, in charge of display at 4 Mays' stores, to stay away from the union since people were getting fired because of it. Hord denied any such conversation. The ALJ resolved this conflict in favor of Gribbins. However, the resolution is based, not on demeanor, but on Hord's "rather incredible" denial he knew of any union activity prior to June 19 (when he asked her to go to Levittown) (fn. 33 and 34, A26). Gribbins admitted Hord did not know she was a union partisan, not on June 11—nor on June 19 (A223). The reason the ALJ found it "rather incredible" for Hord not to know about the union activity is that "union activities" were going on since February, there were NLRB proceedings, Katz had testified, so did "fellow Supervisor De Ronde," the Regional Director dismissed the petition, and "fellow Supervisor De Ronde" and other maintenance employees had been so advised (fn. 33, A26).

Argument on This Gribbins 8(a)(1).

The ALJ found Mays' Massapequa had 72 departments (A29). He finds Hord was in charge of the display department, not only at Massapequa, but also at the Levittown, Woodmere, and Glen Oaks stores (A25), and, indeed, constantly travels to all of them (A332). The organizing efforts of the 7 maintenance helpers, in the Massapequa store only, started in February, and involved those who look after the bulbs, and who assist De Ronde in caring for the blowers, air conditioners, roof leaks, and the like, in that store (A399). Not an iota, not a scintilla, of evidence was adduced to show that Hord knew—or why he should know—what went on with these 7 people, their unionization, and why he knew or should have known about the first NLRB proceedings (selected steps in which the ALJ so carefully recites, as if the proof of those steps, e.g., Katz and "fellow Supervisor" De Ronde testified at the NLRB hearing, substantiates the finding). How, more particularly, could Mays guess that, after the dismissal of the first petition, that the Operating Engineers and the Service Employees would join to organize window trimmers such as Gribbins. Indeed, De Ronde testified, without contradiction, the message from Cannon, to be relayed to Brandt, was that the Union won, which De Ronde interpreted as meaning the Union was "in" (A406). We have already described how huge and how busy the store is.

Since the ALJ did not rely on demeanor to make his findings (we repeat, even so, the articulation of the "magic word 'demeanor'" does not provide an automatic basis for a Court's or the Board's rubberstamping a credibility finding, *Bon-R Reproductions, Inc.* v. *N.L.R.B., supra,* 2 Cir., 309 F.2d 898, 903; *Permaneer Corporation, supra,* 214 NLRB No. 47, p. 6, mimeo), it is proper to consider the other relevant elements entering into the resolution of credibility (*Harvey Engineering Co., supra,* 209 NLRB No. 95; *Poinsett Lumber, supra,* 147 NLRB 1197).

Now, Hord said he first learned about the union business in the June 19 conversation with Gribbins in the cafeteria and so told her—about which more, shortly—when Warwel was also present, as Gribbins herself testified (A198), a point the ALJ so conspicuously omits even to mention, notwithstanding Warwel had actually been subpoenaed by the General Counsel, who "ultimately decided" not to call him (A347). Surely his testimony could have cast considerable light on Hord's comments. We may also note the second petition, G.C. Ex. 2(c), was filed June 19 (A439), which would not have been received by Mays till after that date. We again note that, apart from the fact that the 27 names on G.C. Ex. 2(e) (A90), involving only those who did cleaning work, more or less, inclusive of the 7 maintenance helpers, did not mention Gribbins' name, so that there was no way even to guess that she might be involved. On June 7, which, so far as the evidence discloses, was the first time that Mays could have learned of the new drive on the basis of Schob's report (G.C. Ex. 12, A91), all it learned was that Brandt was organizing the porters, which would further delineate organizational interest only in getting porters, a factor completely irrelevant to Hord, who was, essentially, a decorator (A332). Why should Katz, then, tell Hord? Why should De Ronde? Because the ALJ calls him "fellow Supervisor De Ronde"? What do the words, "fellow supervisor," imply? Surely, in so huge a store, with so many customers, with 72 departments, with all sorts of supervisors, with about 650 in constantly changing help, with Hord directing display work in four stores, travelling from Massapequa, to Woodmere, to Levittown, and to Glen Oaks, the ALJ cannot be implying, by calling De Ronde a "fellow supervisor," the applicability of the "small plant" doctrine (*N.L.R.B.* v. *Abbott Worsted Mills,* 1 Cir., 127 F.2d 438; see "refinement" of this doctrine in *N.L.R.B.* v. *Joseph Antell, Inc.,* 1 Cir., 358 F.2d 880, particularly applicable in light of the fact that the maintenance helpers had been meeting out-

side the store, in the parking lot, and in Madden's Pub, A137; *Bill's Coal Company, Inc.* v. *N.L.R.B.*, 10 Cir., 493 F.2d 243, 247-248).

We have no choice but to repeat what we have said before. The ALJ—and Board—have again not only ignored the inherent probability and logical consistency of the facts (*Renato Achiro, supra,* 215 NLRB No. 119), here overlooking the conspicuous failure to call Warwel (*Interstate Circuit* v. *U.S., supra,* 306 U.S. 208, 225-226; *NLRB* v. *Ford Radio Mica Corp., supra,* 2 Cir., 258 F.2d 457, 463; *Standard Beverage Inc.,* 216 NLRB No. 53), but also, have again rested the credibility resolution and, hence, the finding, on the suspicion, surmise, and conjecture forbidden to them (*N.L.R.B.* v. *Garner Tool and Die Manufacturing, Inc., supra; N.L.R.B.* v. *Miami Coca-Cola Bottling Co., supra*).

Since the credibility resolution, on the basis described, is the only basis articulated for this Gribbins 8(a)(1), the latter must fail.

Second Gribbins 8(a)(1)—Alleged Promise of Benefits as Constituting Interference and Coercion of Employees' Sec. 7 Rights (A27).

We note the anomaly of this 8(a)(1), in such stark contrast to the "threat" offered a week prior. Substantial as such anomaly is, however, it does not begin to approach in substance the anomaly evidenced by the juxtaposition of the retention of this 8(a)(1), and the rejection of the Gribbins transfer 8(a)(3) by the Board (A53; A55). If her actual, subsequent transfer to Levittown, in status quo, was not an unfair labor practice, it becomes difficult for us, at least, to understand how a concomitant offer to promote her to a higher post there (this, at a time when Gribbins herself admits that Hord did not know she had signed up with the Union, A223) constitutes an unfair labor practice. We go so far as to suggest that the retention of this 8(a)(1) may have been overlooked by the Board.

As regards the evidence, all agree that Gribbins possessed considerable display talent, disregarding the question as to whether a chronic griper can be "an exemplary employee," as the ALJ found (A24; A36-A37). Hord testified that, at the June 19th meeting in the cafeteria, with Warwel present, he (Hord) brought up the possibility, having done so before, of Gribbins' and Warwel's going to Levittown to take over jointly as display manager, in place of Igloi, the then display manager there, who was retiring (A333) and who did, in fact, retire somewhere in Florida (A334; A264). He is firm that he made no offer, and, regrettably, albeit necessarily, repetitiously, Warwel was subpoenaed but not called. Gribbins had it that this "offer" was made to induce her to accept the transfer over to Levittown despite her vigorous protests (A198-A199; A223). The ALJ said, merely, he credits Gribbins' version (fn. 35, A27) and finds an 8(a)(1) "promise of benefits" to remove her as an "active participant in union activities."

Argument on the Second Gribbins 8(a)(1).

We do not claim to know precisely what the credibility resolution presumably definitively resolves but we take it to mean, at least, the ALJ accepts Gribbins' story that Hord said he would mitigate the pain of her transfer by offering her a promotion, which constitutes the illegal promise of benefits. However, there are other and much more significant facts bearing on the credibility resolution. Firstly, General Counsel's failure to call Warwel, though he subpoenaed him, is very significant. Secondly, the ALJ, even more significantly, failed to note that, despite Gribbins' version, she admitted Hord did not even know she had signed a card—this is at A223. How the ALJ reconciled that, we do not know. Thirdly, still more significantly, the ALJ found the "promise of benefits" was made "for the purpose of removing Gribbins from being an active partici-

pant in union activities" (fn. 34, A27). But, the Board found she was not an active participant (A54), and, additionally, reversed (fn. 1, A55) the ALJ's finding that Gribbins was under surveillance on August 20, because she was a "union activist" (fn. 47, A37). Fourthly, Hord said (and Gribbins never denied this) he had spoken to her before of this possibility of jointly taking Igloi's place when he retired. No question is raised as to Gribbins' competence and, with her experience at Levittown, and with Warwel's help, it would appear to be entirely reasonable for Hord to so plan ahead for the vacancy eventuating with Igloi's departure.

In the face of all the indicated circumstances, we need merely point out that, here, too, a generalized demeanor finding, crediting Gribbins over Hord is, purely and simply, an insufficient basis on which to ground this 8(a)(1) (*Harvey Engineering Company, supra,* 209 NLRB No. 95). (To the extent that the ALJ's resolution of credibility with respect to the June 11 conversation and 8(a)(1) influenced him, our previous discussion, of course, remains fully applicable.) The credibility finding is far outweighed by an overpowering combination consisting of considerations of inherent plausibility and logic (*Renato Achiro, supra*), General Counsel's failure to call Warwel though he subpoenaed him (*Interstate Circuit* v. *U. S., supra; N.L.R.B.* v. *Ford Radio & Mica Corp., supra; Standard Beverage, Inc., supra*) and, most of all, by the Board's own removal of the basic underpinning on which this 8(a)(1) is lodged, nor, we must again point out, is this removal predicated solely on the Board's own finding she was not a union activist (A54), whose activism the ALJ deemed Respondent so anxious to repress (fn. 35, A27). To revert to our opening in this connection, the removal of the basic underpinning is even more highly delineated because the Board found that actually sending Gribbins to Levittown in her then capacity was not improper, so that an offer to send her there in an enhanced capacity could hardly be improper.

It follows, we think, the Board's finding of an 8(a)(1) in the premises, if not, as we suggest, an outright oversight, can only be based on conjecture, suspicion and surmise, shot through with inherent lack of logic, and thus, as our repeatedly cited authority has it, not predicated on the required substantial evidence (*N.L.R.B.* v. *Garner Tool and Die Manuf. Inc., supra; N.L.R.B.* v. *Miami Coca-Cola Bottling Co., supra*).

The credibility resolution goes beyond invalidity. It approaches—it may even have attained—irrelevancy. The second Gribbins 8(a)(1) fails.

The Lynch 8(a)(1)—Alleged Coercive Interrogation; Alleged Creation of Impression of Surveillance; Alleged Threat of Retaliation for Failure to Provide Information Concerning Protected Activity (A41-A42).

This piece of minutia epitomizes, as much if not more than any other incident, our reference to the same old hash being reheated and called another dish. It arises out of a literally impossible statement made by Lynch and accepted by the ALJ—and the Board—to wit, someone had "seen" him talking to Cannon on the elevator about the union (A41—the ALJ erroneously refers to "elevators"; A238-A239). What happened was that Kaye saw Cannon and Lynch, and only Cannon and Lynch, no others, emerge from an unattended passenger elevator, the riding of which was strictly against the rules (A304-A305; A398). De Ronde, Cannon's supervisor, was not on that night, but Schob, Lynch's supervisor, was. Kaye told Schob to ascertain the reason for their running a passenger elevator in the absence of the operator. It is this insignificant bit of fluff which gives birth to not one basis, but three bases, for an 8(a)(1) finding.

Argument on the Lynch 8(a)(1).

At A395, the ALJ observed it proves nothing if an employer, learning about an event in his establishment, seeks to document that event and asks employees to make statements concerning it—"without more." Presumably, then, "more" has been found.

The evidence is uncontroverted that Lynch and Cannon (Cannon, incidentally, was asked not one single question by the General Counsel about this incident when he was on the stand; we, of course, knew nothing about it until it was brought up by Lynch) were operating the passenger elevator unauthorizedly—no one was there but they. The question immediately arises how anyone could see—or even hear—them talking about the union in the elevator; yet, this is precisely what Lynch said Schob told him (A238) and which the ALJ actually found (A41). This is incredible on its face, we suggest, the kind of patent incredibility that simply is not acceptable.

This "incredibility" is rearticulated in the Board's brief here, at p. 14, as follows:

> "The undisputed facts show that in late June, Schob advised Lynch that Store Manager Kaye had observed Lynch talking with Cannon about the Union on one of the elevators."

We may note, parenthetically, that this incident, along with others (see, e.g., fn. 5 at page 14 of the Board's brief, as well as the General Counsel's exceptions), serves also to reflect General Counsel's distressing tendency, so accentuated in this case, to classify any supervisory notice of a dereliction of duty as surveillance, or creation of the impression of surveillance (see *N.L.R.B.* v. *Mueller Brass Co., supra,* 5 Cir., 509 F.2d 704, 709, adv.), any question with respect thereto as "coercive interrogation" (e.g., fn. 24, A21).

It is beyond doubt that Schob asked Lynch what was he doing in the elevator with Cannon, and Lynch came right out and told him they were talking union (A373-A374). In

fact, Lynch testified he had prior conversations with Schob about the union and told Schob, his "on the clock" supervisor, that, he, Lynch, signed a card solicited by Murphy (A242). If Lynch is to be believed, Schob told him, "I didn't hear that," which would hardly make Schob an enemy of Lynch. In any event, Schob's only reply now was that Lynch should know he had no right to be in the elevator without the operator (A374). Schob then reported to Kaye that they were riding the passenger elevator talking union. Kaye, not imposing any discipline for the infraction, told Schob to ask Lynch for a statement, carefully warning Schob there were to be no threats or pressures of any kind—it was to be only of Lynch's own free will and Schob testified he did precisely that (A305; A374). Lynch wrote out the statement, G.C. Ex. 14, A93, which (this is the General Counsel's own exhibit), on its face states, "I do this of my own free will." Kaye's purpose was to go "on record," since he had a "union problem" in the store (A329). The evidence is uncontested that all he did with the statement was to file it—period (A328). We pass over the testimony at A239 and A240, where Lynch keeps saying he was "asked" to write all this, he, Lynch, "decided" to do so, while General Counsel keeps asking what "made" him do it, the purpose of the use of the word, "made," being rather obvious. What is more important is that Lynch has it that he wrote down that Cannon did not ask him to join, this at Schob's suggestion, after Schob learned that was the fact. Again, Schob is hardly being portrayed as an enemy of Lynch, or as anything more than an unsophisticated, minor supervisor of porters asking for a statement of the literal truth.

Neither Lynch nor Cannon were warned or reprimanded, nor was discipline of any sort meted out (A242; A304; A401). The General Counsel, presumably consistently with the practice of tenaciously withholding any disclosure possible, didn't even subpoena this statement prior to the hearing, although he must have known of its existence when

he interviewed Lynch before the hearing. He asked for it only in the course of his cross examination of Kaye, we produced it under the usual threat of adverse inference, and General Counsel introduced it as his exhibit (A328-A329).

In any event, the "problem" here arises out of Lynch's testimony, believed over Schob's apparently, that he asked Schob, what if he didn't make a statement, to which Schob is alleged to have replied, " * * * you never know, it could be your job or his" (Cannon's, that is, A239). Presumably, this is the "more" which prompted the ALJ to go beyond his own observation (A395) of the propriety of an employer's seeking to document an event taking place in his establishment.

In *Service Technology Corporation,* 196 NLRB 845, 847, the Company's manager of industrial relations, in investigating apparent misconduct involving an intraunion argument, threatened to take disciplinary action against employees who refused to give their version of the incident involved (actually, it was found, inter alia, that one of those involved, Barnhill, was told he could be fired for refusing to make a statement and, indeed, was suspended for his role in the incident). The opinion of the Trial Examiner, upheld by the Board, was that the Company had a right to uncover employee misconduct and to take disciplinary action in case of refusal of the employees involved to give their versions.

The cited case demonstrates that Schob's response to Lynch's question is, as a matter of law, insufficient to convert this attempt to document into "a threat of retaliation for refusing to accede to the demand to divulge information concerning protected activities" or "coercive interrogation" (A42). Even though the word, "union," was mentioned by Lynch, it was not obligatory for management to back off. This makes it unnecessary to explore the evidence issues arising out of Lynch's statement saying he was making it "of his own free will" (G.C. Ex. 14, A93), or out

of General Counsel's constantly asking what "made" Lynch write this, notwithstanding Lynch's repeated testimony he was "asked" to do this. Nor, finally in this connection, does it follow, even from Lynch's testimony as to what Schob said, that Lynch was in fact threatened (into making his truthful statement, although such a threat would be entirely proper in the circumstances) (*N.L.R.B.* v. *Sachs, supra,* 7 Cir., 503 F.2d 1229, 1235).

As regards creating the impression of surveillance, the Board has long held that supervision of the activities of employees, union proponents or not, is a proper incident of a supervisor's functions (*Mt. Vernon-Woodberry Mills, Inc.,* 64 NLRB 294, 297). In *East Side Shopper, Inc., supra,* 204 NLRB No. 125, a case involving not only a background of serious unfairs and resulting in a bargaining order (additionally, the employer there had in fact met with employees, stated it was in bad shape economically, indicated union success and increased wage demands might cause a loss of jobs, and suggested recall of their cards by union adherents—this was not held to be an illegal threat), a high official moved from his office and took a desk near union adherents, admitting the "organizational situation" was a factor in the decision to so move. The ALJ (and Board) held this perfectly proper, as a legitimate prerogative of management, and found no creation of the impression of surveillance. In *Sarkes Tarzian, Inc.,* 169 NLRB 587, 588, the Board, disagreeing with the Trial Examiner, found no surveillance in the action of two foremen sitting outside a rest room during an organizational campaign and making notes, on a pad, every time employees went in and out of the rest room. The Board found it the "sheerest speculation" that the purpose of this was surveillance for the purpose of ascertaining union sympathies or union activities. It is also the sheerest speculation here (*N.L.R.B.* v. *Gomer Tool & Die Manufacturing, Inc., supra,* 493 F.2d 263, 268 *N.L.R.B.* v. *Miami Coca-Cola Bottling Co., supra,* 5 Cir., 222 F.2d 341, 344).

We go further. Even if, by some magic, Kaye could see or hear Lynch and Cannon talk union in the course of unauthorizedly operating a passenger elevator, he had the right, nay, the duty, to record and document all the circumstances (which is all he did).

Finally, the Lynch episode, too, is still another minuscule, isolated, and vagrant incident unworthy of Board action (*Bon-R Reproductions, Inc., supra,* 2 Cir., 309 F.2d 898, 903). Indeed, given the disposition and effect of this matter, we should have thought the Board would have expressed the same irritation at its inclusion as it did in *American Federation of Musicians, Local 76,* 202 NLRB No. 80, a comment we do not restrict to the Lynch episode alone.

The Broad Order (A43-A48; A55-A58).

For the purposes of this discussion, we assume, arguendo, none of the unfairs were erroneously found.

The recital by the ALJ at pars. 3 and 4, of his conclusions of law, set out at A44, inclusive of the free use of the word, "employees," portrays what is an appallingly gross exaggeration. Moreover, the contents of par. 3 were, in effect, cut by the Board more than half, while the contents of par. 4 were reduced by elimination of the surveillance finding as to Gribbins. What is left, then, is this. One employee was dismissed for ignoring an absolutely correct warning, and a few isolated incidents in a huge establishment took place, mostly in the course of open discussions with a low level, friendly supervisor with whom union discussions were uniformly had, or in the course of effectuating the functions of a low level friendly supervisor. None had any apparent effect. Apart from Brandt, not a single dismissal, disciplinary action, record reprimand, or other such deprivation has been shown to have eventuated therefrom. To paraphrase the Board, there were 30 people involved in the unit petitioned for the second time (A54), but Brandt was found to be the only one illegally dismissed.

The last (and, so far as we have been able to ascertain, the only) case in which Mays was found to have committed an unfair labor practice took place more than 10 years ago and was concerned almost exclusively with the Brooklyn or headquarters store.* Apart from 8(a)(1)s, there were some seven 8(a)(3)s found. This Court nevertheless modified the broad order granted, relying on *Communications Workers of America* v. *N.L.R.B.*, 362 U.S. 479, 80 S. Ct. 838, 4 L.Ed.2d 896, saying there was no showing of acts directed against other unions. There is no such showing here either. Local 307 was nothing but an appendage of Local 30. No union lawyer appeared at all, and only at the first, short, hearing day, Dec. 18, 1973, did Mr. Lunger, business representative of Local 30, appear. Having filed the charges here, referred to as G.C. Ex. 1(a), G.C. Ex. 1(c), G.C. Ex. 1(e) (A59-A61), having unsuccessfully handled Upton's appeal, that ended their participation. A greater case of union disinterest could hardly be shown, which falls far short of denigrating our view as to the good faith filing of the charges in the first place. And, of course, it is basic that the Board has no mandate to restrain, generally, unfair labor practices neither found nor persuasively related to those proven (*N.L.R.B.* v. *Express Publishing Co.*, 312 U.S. 426, 433, 61 S. Ct. 693, 85 L.Ed. 930; *N.L.R.B.* v. *Builders Supply Co. of Houston*, 410 F.2d 606, 611; *Sweeney & Company, Inc.* v. *N.L.R.B.*, 5 Cir., 437 F.2d 1127, 1135-1136).

We revert to what we said at the outset. A few incidents, themselves at worst "little more than multiplication of minutia" (*N.L.R.B.* v. *United Parcel Service, supra*, 1 Cir., 317 F.2d 912, 914), in a perfectly enormous store, colored the whole fact-finding process. The process employed here

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* *J. W. Mays, Inc.* v. *N.L.R.B.*, 2 Cir., 356 F.2d 693, a striking example of the advantages inherent in credibility "dice shoots" by 8(a)(3)s testifying to unwitnessed, supervisor "admissions" constituting the entire basis of their case. Happily, *Mays* is not so burdened here.

ignored the employer's overlooking of numerous discharge possibilities with respect to the union adherents involved, the retention of the vast majority of union adherents, subjected to no discrimination, the bulk of the 8(a)(1) testimony emanating from 5 alleged 8(a)(3)s, 4 of whom were found to have been properly terminated, the concomitant terminations of more than 240 non-union employees, and the meticulous informing of Brandt of his right to solicit (*N.L.R.B.* v. *Wix Corp., supra,* 309 F.2d 826, 839). A broad order relating to other unions or referring to violations "in any other manner" was not only unwarranted; it was vindictive.

CONCLUSION

The Board's order should be denied enforcement in toto.

Dated: New York, New York
April 22, 1975

Respectfully submitted,

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ADDENDUM

ADDENDUM

Pertinent parts of Sections 157 and 158 of Title 29 U. S. Code—Sections 7, 8(a)(1), 8(a)(2), 8(a)(3) and 8(a)(4) of the National Labor Relations Act, as amended

Title 29, U.S.C.

Sec. 157

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities * * * .

Sec. 158

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this sub-chapter;

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	:	
Petitioner,	:	Docket No. 74-2496
v.	:	
J. W. MAYS, INC.,	:	
Respondent.	:	

CERTIFICATE OF SERVICE

The undersigned certifies that two (2) copies of the Respondent's printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

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Dated at New York, New York

this 22nd day of April, 1975